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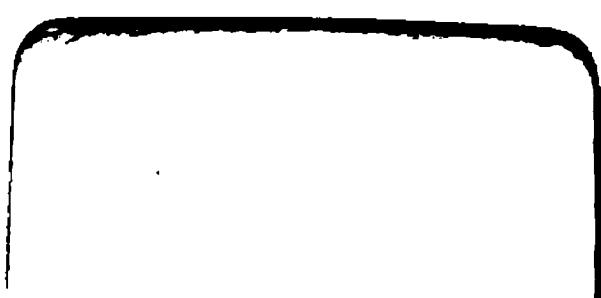
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THE
AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

**SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"**

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN,
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

VOL.. XLVII.

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AMERICAN STATE REPORTS.

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AMERICAN STATE REPORTS.
VOL. XLVII

CASES
IN THE
COURT OF CRIMINAL APPEALS
OF
TEXAS.

EX PARTE AUGUSTINE.

[33 TEXAS CRIMINAL REPORTS, 1.]

RES JUDICATA.—IF BAIL IS GRANTED after indictment found, the accused cannot be rearrested for the same offense on a new indictment and bail refused. The right to bail is *res judicata*.

Kleberg & Crain, and Glass & Burgess, for the appellant.

R. L. Henry, assistant attorney general, for the respondent.

DAVIDSON, J. The appellant, having been denied bail, prosecutes his appeal. The questions presented are legal, arising upon an agreed statement of facts, substantially as follows, to wit: On the 21st of December, 1876, the grand jury of De Witt county preferred an indictment against appellant and others, charging them with the murder of Philip Brassell; that on the 29th of the same month the cause was, on change of venue, transferred to Bexar county; that on account of sickness, rendering it dangerous to longer confine appellant, he was admitted to bail in the sum of ten thousand dollars, and this occurred in December, 1882. The following January, the state, after exhausting diligence, could not secure the attendance of the witnesses for the prosecution, and, being unable to longer continue the case, dismissed it as to relator. On the thirty-first day of December, 1891, the grand jury of De Witt county reindicted the relator for the same murder, and the venue was changed to Gonzales county, where it was again continued by the state, on June 25, 1893.

It was admitted, and shown to be true, that the offense

charged in the indictment found in 1876 was identical with that set forth in the bill preferred in 1891.

We deem it unnecessary to discuss more than one of the legal questions presented for decision, to wit: When a person charged with a capital offense has once been admitted to bail, after indictment found, he shall not be subject to be again placed in custody on a new indictment, without bail, for the same offense, except on surrender by his sureties, whether the bail be granted on the facts or on account of ill-health. In other words, when bail is once granted, after indictment found, it is beyond the power of the state to rearrest for that offense on a new indictment and refuse bail, the right to bail being *res adjudicata*. This • proposition is fully sustained by the authorities, were it necessary to look beyond our own statutes: Wells' *Res Adjudicata* and *Stare Decisis*, sec. 421; Church on *Habeas Corpus*, 386; *Ex parte Jilz*, 64 Mo. 205; 27 Am. Rep. 218. Looking to our own legislation we find that article 187 of the Code of Criminal Procedure provides: "Where a person once discharged, or admitted to bail, is afterward indicted for the same offense for which he has been once arrested, he may be committed on the indictment, but he shall be again entitled to the writ of habeas corpus, and may, notwithstanding the indictment, be admitted to bail, if the facts of the case render it proper; but, in cases where, after indictment found, the cause of defendant has been investigated on habeas corpus, and an order made either remanding him to custody or admitting him to bail, he shall neither be subject to be again placed in custody, unless when surrendered by his bail or when the trial of his cause commences before a petit jury, nor shall he again be entitled to the writ of habeas corpus, except in special cases mentioned in articles 155 and 189."

Article 155 has reference to cases where the health of the accused is of such a nature as to endanger his life by further confinement.

Article 189 applies to cases where, subsequent to the first application, important testimony has been obtained which was not within the power of the applicant to produce at the former hearing.

These provisions are enacted for the benefit of the accused, and can only be invoked in his behalf. The state is not entitled to a new trial, and is debarred the right of appeal by the constitution of this state, and there is no way by which the

state can vacate a judgment, and retry the accused of its own right.

A judgment granting bail is final as to the state, and even to the accused, unless he should seek to reduce the amount of bail granted by appeal or otherwise. Whether the investigation, after indictment found, mentioned in article 187, related to the facts, or when bail is granted on account of ill-health, we think is not material, because in neither event can the state cause the rearrest and second incarceration of the accused for the same offense. We deem it unnecessary to discuss this question at length.

The judgment is reversed, and the relator granted bail in the sum of ten thousand dollars. The sheriff of Gonzales county is directed to take his bond for that amount in the terms of the law governing such cases.

Judges all present and concurring.

HABEAS CORPUS—BAIL—RES JUDICATA.—The discharge of a person upon habeas corpus conclusively determines that he was not liable to be held in custody upon the state of facts then existing. And it is provided by the Texas Code of Criminal Procedure, articles 186, 187, found in Williams' Texas Criminal Statutes, sections 1670, 1671, that where a person once discharged or admitted to bail is afterward indicted for the same offense for which he has been once arrested, he may be committed on the indictment, but shall again be entitled to the writ of habeas corpus, and may, notwithstanding the indictment, be admitted to bail, if the facts of the case render it proper: Church on Habeas Corpus, 2d ed., sec. 386 a.

HARKEY v. STATE.

[33 TEXAS CRIMINAL REPORTS, 100.]

DISORDERLY HOUSE.—A HOUSE MAY BE PROVEN TO BE disorderly by evidence of its general reputation or of the general reputation of its occupants.

DISORDERLY HOUSE—EVIDENCE OF REPUTATION—CROSS-EXAMINATION.—

After a witness has testified that the general reputation of a house is that it is disorderly, he may be asked on cross-examination "if he knows what a disorderly house is."

INSTRUCTIONS UPON THE WEIGHT OF EVIDENCE are erroneous.

100 SIMKINS, J. Appellant was convicted of keeping a disorderly house, and his punishment assessed at two hundred dollars, from which he appeals.

1. The witness, Kirkpatrick, having testified that he "was acquainted with the general reputation of appellant's place

as a disorderly house," was asked by defendant if he knew what a disorderly house was; but the question was excluded by the court on the ground that the witness was illiterate, and that lawyers must not put the dictionary to the witness. We think the question was a proper one. There is no question that a house may be proven to be disorderly by general reputation of its being kept for purposes of prostitution: *Allen v. State*, 15 Tex. Crim. App. 322; *Stone v. State*, 22 Tex. Crim. App. 190; and it may also be shown by general reputation of the character of the women residing at or frequenting the house: *Sylvester v. State*, 42 Tex. 496; *Allen v. State*, 15 Tex. Crim. App. 322; *Downs v. State* (Tex. Crim. App., Oct. 7, 1893), 23 S. W. Rep. 684. But where the witness simply testifies to its reputation of being disorderly, it does not preclude a cross-examination to ascertain if witness knew what he was testifying about.

2. In charging the jury, the court, over appellant's objection, read to them the article of the Penal Code relating to the keeping of a disorderly house and the punishment therefor, and then verbally instructed the jury as follows: "Gentlemen, if you believe from the ¹⁰¹ evidence, beyond a reasonable doubt, that the defendant owned that house, rented that house, or leased that house, you will find the defendant guilty, and assess his fine at just two hundred dollars." The charge was given over the objection of appellant, and the exception duly reserved in a bill of exceptions approved without comment. The objections are well taken. The court has no right to verbally instruct the jury not only without consent of appellant, but over his objection: Code Crim. Proc., art. 682; Willson's Criminal Statutes, sec. 2359; and, in the second place, the court in effect instructed the jury that the evidence was amply sufficient to show that the house was disorderly. The only question they had to decide was the connection appellant had therewith. The charge was clearly on the weight of evidence.

The judgment is reversed and the cause remanded.

Judges all present and concurring.

DISORDERLY HOUSE.—The character of a house, as being one of ill-fame, cannot be shown by general reputation, but must be proved by particular facts: *Kenyon v. People*, 26 N. Y. 203; 84 Am. Dec. 177; *Henson v. State*, 62 Md. 231; 50 Am. Rep. 204, and extended note; *Handy v. State*, 63 Miss. 207; 56 Am. Rep. 803. Evidence of general bad character for chastity of

females who frequent a house is competent to show that the house is of bad repute on an indictment for keeping a house of ill-fame: *Commonwealth v. Gannett*, 1 Allen, 7; 79 Am. Dec. 693, and note; note to *Beard v. State*, 17 Am. St. Rep. 541.

APPEALS IN CRIMINAL CASES.—INSTRUCTIONS AS TO THE WEIGHT OF EVIDENCE are erroneous: *Garner v. State*, 28 Fla. 113; 29 Am. St. Rep. 232, and note; *Stockman v. State*, 24 Tex. App. 387; 5 Am. St. Rep. 804; *Wesley v. State*, 37 Miss. 327; 75 Am. Dec. 62.

WILLIAMS v. STATE.

[88 TEXAS CRIMINAL REPORTS, 123.]

ACCOMPLICES—QUESTION FOR JURY.—If criminal connection with an unlawful act is an admitted fact, the court may charge that the party so connected is an accomplice, and should be corroborated. If there is any question about it, it should be left to the jury to say whether he is an accomplice.

JURY TRIAL—EVIDENCE OUT OF COURT.—The fact that the jury, after the evidence in a criminal case is submitted and before a verdict is rendered, read a complete and accurate newspaper account of the evidence, not manifesting any prejudice nor bias, nor indicating the drift of public opinion as to the guilt or innocence of the accused, is not prejudicial to him, and though not properly before the jury, is not such additional evidence as to vitiate the verdict.

JURY TRIAL—NEWSPAPER REPORT OF EVIDENCE.—The fact that a complete and accurate newspaper account of the evidence in a criminal case contains a headline stating that "defendant was not placed on the stand," and is read by the jury before a verdict is rendered, does not vitiate such verdict.

JURY TRIAL—CONSIDERATION OF IMPROPER EVIDENCE.—If evidence offered by the state to prove that the accused, shortly after his arrest, attempted to commit suicide, is promptly excluded by the court under instructions to the jury that it must disregard the matter, the fact that it is again referred to and stated to be true after the jury has retired and before verdict does not vitiate such verdict, if the jurors all agree not to consider the matter and state under oath that they were not influenced thereby.

JURY TRIAL—CONFLICT OF EVIDENCE in a criminal case is peculiarly a question to be settled by the jury.

M. M. Brooks, for the appellant.

R. L. Henry, assistant attorney general, for the respondent.

134 SIMKINS, J. Appellant was convicted of murder in the first degree, and his punishment assessed at imprisonment for life.

1. Appellant contends that the court erred in refusing to charge that Mrs. Lona Humphreys was an accomplice to the

murder of her husband. The evidence shows that no one was present at the murder of her husband but appellant and Mrs. Humphreys; that after the ¹⁸⁵ homicide Mrs. Humphreys went one-half mile to her brother's house and told him that two strange men had come into the house and killed him with the axe. Mrs. Humphreys said she made this statement because she was afraid of appellant, and believed that he was close by to hear what she said; that he told her what to say, and she feared to make any other statement until she could get to the officers of the law. If the criminal connection with the unlawful act is an admitted fact, the court may charge that the party so connected is an accomplice, and should be corroborated. If, however, there is any question about it, then it should be left to the jury to say whether the witness is an accomplice. In *Zollicoffer v. State*, 16 Tex. Crim. App. 317, where it was contended that the court should have directly charged the jury that the witness Green was an accomplice, the evidence being so conclusive of that fact, that court says: "Whilst it would not, under some facts, be improper for the court in its charge to assume and instruct the jury that the witness is an accomplice, still we do not think it is error to submit the question to the jury": *White v. State*, 30 Tex. Crim. App. 652, 657; *Freeman v. State*, 11 Tex. Crim. App. 92; 40 Am. Rep. 787; *Elizando v. State*, 31 Tex. Crim. Rep. 237. The charge fully instructed the jury on this question, and the court did not err in refusing the requested charges.

2. Appellant further contends that the court below erred in not granting a new trial upon the ground that the jury read the daily newspapers, which contained incorrect accounts of the testimony adduced on the trial. This ground of the motion was sustained by the affidavit of John Baker, one of the jurors, who states that he saw two of the jurors reading the page of the *Daily Greenville Herald* containing a synopsis of the evidence adduced on the trial. This was after the evidence had gone to the jury, and before they had rendered a verdict. The evidence as reported in the newspaper is copied in the transcript, and, after a careful comparison with the agreed testimony, we are unable to appreciate the objection that the newspaper report of the evidence was incomplete or inaccurate, nor has counsel in his brief pointed out any inaccuracy. So far as we are able to gather from the transcript, there is nothing in the report nor in the paper itself which

in the slightest degree indicated the drift of public opinion as to appellant's guilt or innocence, nor is any prejudice or bias for or against appellant shown in any comment therein, and it contained no fact that was not introduced in the evidence on the trial. While it is true that where a newspaper contains prejudicial reports of the trial, or comments on the case or the persons or character of those connected therewith (*Walker v. State*, 37 Tex. 366, 389), or where it contains matter calculated to influence the verdict (*People v. Murray*, 85 Cal. 350), the verdict should be set aside; yet when there is nothing in the newspaper statement of the evidence calculated in any ¹³⁶ way to affect the rights of defendant, while it is not proper to admit it to the jury, still it should not vitiate the verdict: *United States v. Reid*, 12 How. 366; *State v. Cucuel*, 31 N. J. L. 263; 12 Am. & Eng. Ency. of Law, 373. It is not receiving additional evidence: Pen. Code, art. 777; Willson's Criminal Statutes, sec. 2545. Nor does the fact that one of the headlines of the report states that "defendant was not placed on the stand" render the reading of the report by the two jurors fatal to the verdict. It merely stated a fact already known to the jury. The inhibition upon counsel in the case alluding to defendant's failure to testify is statutory (Acts 21st Leg. 37), and it is for that reason we reverse cases where the statute is violated, even though the error was harmless.

3. Appellant further complains that the jury were probably influenced by the fact that appellant after his arrest attempted to commit suicide by cutting his throat, and that the matter was referred to in the jury-room. The record shows that the state offered to prove this fact, but it was promptly excluded by the court, who instructed the jury to disregard the matter; that after the jury retired the matter was again referred to and stated to be true, when the foreman warned the jury that they must not consider the matter, as it was not introduced in testimony, and all the jury agreed that it should not be considered. We think that the record fails to show that the jury were influenced by the statement. On the contrary, the affidavit of a juror who stated the facts further states he did not believe the jury were influenced thereby, and this is corroborated by the affidavit of the foreman.

4. The evidence in the case was peculiarly a question for the jury. If Mrs. Humphreys, the principal witness for the state, is to be believed, appellant was guilty of a fearful murder. If the witnesses for the defense are to be believed,

appellant was at the time of the murder lying ill at his brother's house, one and a half miles away, and is innocent, and Mrs. Humphreys herself is the guilty party. The motive for killing Humphreys was very strong on the part of appellant. Humphreys had abandoned his wife some three years before, and appellant shortly after went to live with her and carried on the farm. A suit for divorce was pending, brought by Mrs. Humphreys against her absent husband, and she promised to marry appellant. Suddenly Humphreys made his appearance and begged to be taken back. After two months' probation she agreed to take him back. This determination, as disclosed by the record, seems to have much affected appellant. He spoke of selling out and leaving the country, saying he was now foot-loose and out of a job, and the night before the homicide spoke so bitterly of the deceased, and seemed so restless, that a witness at whose house he was begged him not to have a difficulty with deceased. But he insisted on returning ¹⁸⁷ "home" (to Mrs. Humphreys') that night. On Friday evening he left Mrs. Humphreys' to go to his brother's, who lived one and a half miles off, and returned at 11 o'clock and called to her to open the door, which she did. He said he wanted to get his coat and vest, which he had left there, and requested her to light a lamp. As she did so she heard a noise and saw appellant strike her husband in the head with an axe. The other corroborating facts are not many. The tracks along the road, which are identified as appellant's, show that he had recently gone twice in the direction of his brother's house, which corroborated Mrs. Humphreys' evidence that he went to his brother's house the evening before and returned at midnight to commit the homicide, and then went back to his brother's, where he was arrested next morning. The spots of blood found on appellant are explained by his family as being caused by nose-bleeding; but if disbelieved on the question of alibi, their explanation was also probably rejected by the jury. As stated, this was peculiarly a question to be settled by the jury. They rejected the appellant's defense of alibi, and the evidence sustains the verdict.

The judgment is affirmed.

Judges all present and concurring.

ON MOTION FOR REHEARING.

SIMKINS, J. We have carefully examined the motion for a rehearing in the light of the brief and oral argument of able

counsel representing appellant, but can see no sufficient reason for changing the conclusions heretofore reached in the case. We desire, however, to modify the statement in the opinion that the state offered to prove that the defendant attempted suicide. It seems that the state only offered to prove that a knife was given to defendant, but the court promptly excluded the testimony, and thereby prevented any further investigation in that line. But this was immaterial. The question to be considered was whether the discussion in the jury-room of the attempted suicide operated injuriously to appellant's rights, and, for the reasons stated in the opinion, we held not.

The motion is overruled.

Judges all present and concurring.

ACCOMPLICES—QUESTION FOR JURY.—Whether a witness is an accomplice is a question of fact for the jury: *People v. Kraker*, 72 Cal. 459; 1 Am. St. Rep. 65.

NEW TRIAL—READING NEWSPAPER REPORTS OF TRIAL BY JURY.—A jury is guilty of misconduct, for which a new trial must be granted, in reading from a newspaper an article purporting to be a report of the evidence given at the trial, which report also contained evidence which the court had rejected as inadmissible, together with an intimation that two of the jurors had been corrupted: *People v. Stokes*, 103 Cal. 193; 42 Am. St. Rep. 102. Reading by the jury of a newspaper article containing remarks prejudicial to the defendant is ground for a new trial: *Cartwright v. State*, 71 Miss. 82.

REYONS v. STATE.

[23 TEXAS CRIMINAL REPORTS, 142.]

WITNESS—DUTY OF PROSECUTION TO PRODUCE.—In a criminal case the prosecution is not required to place every eye-witness on the stand.

HOMICIDE IN DEFENSE OF ANOTHER — MANSLAUGHTER. — If the accused, seeing the origin of a difficulty between others, and knowing that one of them is in no danger, but that the interference with the latter by the deceased and his son is to prevent him from injuring the party with whom he is having the trouble, and the accused, with a sedate and deliberate mind, then forms a plan to kill, and does kill, the deceased, he is guilty of murder in the first degree, and not manslaughter.

TRIAL—CONTINUANCE.—A motion for a continuance of the trial to obtain absent witnesses is properly overruled upon a showing that they were not present at the time of the occurrence in question, or that their proposed evidence is not probably true, or that it is too generally stated, or stated in mere conclusions.

H. L. Davis, for the appellant.

R. L. Henry, assistant attorney general, for the respondent.

¹⁴⁴ DAVIDSON, J. The conviction in this case was of murder in the first degree, and the punishment assessed was death.

Ferma Lerma, Manuel Aguirre, and Clem King, having been summoned as witnesses by the state, were present at the trial. The defendant moved the court to require the prosecution to place them on the stand and elicit their testimony. This was refused, and an exception reserved. The state's case was made out by the testimony of eye-witnesses, and it is therefore unnecessary to discuss the rule laid down in *Thompson v. State*, 30 Tex. Crim. App. 325, relied on by defendant. That case is authority to the extent that it holds the state should prove the guilt of the accused by positive rather than by circumstantial evidence. It in no sense sustains the position of appellant that all eye-witnesses to a homicide are required to be placed on the stand and examined by the state. In fact, we do not understand that such a rule of practice has ever obtained in this state, nor that it would be a correct one under our procedure. In the case of *Wheelis v. State*, 23 Tex. Crim. App. 238, it was said, Judge Hurt delivering the opinion of the court: "It seems from the brief of the counsel that *Hunnicutt v. State*, 20 Tex. Crim. App. 632, is so construed as to require the state to introduce all the testimony of witnesses to the transaction in all cases. My brethren do not, nor did they in that case, intend to convey any such idea. It is expressly stated in that case, and in *Phillips v. State*, 22 Tex. Crim. App. 139, that this matter is in the sound discretion of the court. That there may be cases in which the rule would not apply is clearly stated. We advise counsel to re-read the Hunnicutt case, and it will be seen that no general rule is attempted to be stated." In *Gibson v. State*, 23 Tex. Crim. App. 423, the same court again announced the same doctrine in the following language: "Neither *Hunnicutt v. State*, 20 Tex. Crim. App. 632, nor *Phillips v. State*, 22 Tex. Crim. App. 139, contains the doctrine that in all cases and under all circumstances must the state place upon the stand each and every eye-witness to the transaction." This doctrine has again been fully reaffirmed by this ¹⁴⁵ court in *Mayer v. State*, 33 Tex. Crim. App. 33, and in *Jackson v. State*, 33 Tex. Crim. Rep. 281.

At an early date, at common law, the rule of practice was as contended for by appellant. This grew out of the fact that under that system the accused had no right to compul-

sory process in capital cases, and because "the prisoner was not even permitted to call witnesses, though present, but the jury were to decide on his guilt or innocence, according to their judgment, upon the evidence offered in support of the prosecution": 1 Chitty's Criminal Law, 624, 625. And while later on the practice of rejecting evidence for the accused was abolished, yet the witnesses on his behalf "were merely examined without any particular obligation, and therefore obtained but little credit with the jury." By reason of the fact that they were not sworn, they did not, and could not, obtain the same decree of credit as those introduced in support of the prosecution. This unjust custom rested upon practice, and not upon law. It certainly could not be held to be just and reasonable, and was entirely done away with by an act of parliament. It then became the settled law of England that no witness could be examined in any criminal proceeding except upon oath. "And this rule is so universal in its operation that a peer cannot be examined upon his honor, but must take the same oath with any other individual." The reason for the rule having ceased, it was but a natural and reasonable sequence that the rule itself should pass away. Whether it did or not, or whatever may be the common-law rule, we do not think it ever applied in this state, for with us the defendant is and always has been entitled to compulsory process for his witnesses, and can take the depositions of witnesses residing in other jurisdictions—a right denied the state. These witnesses are required to give their testimony under oath, and, in so far as the law can do so, are placed upon the same plane with the witnesses for the prosecution. In the trial the accused has at least equal rights with the government in regard to the introduction of testimony, and the state must make out its case beyond a reasonable doubt; else the defendant is entitled to an acquittal. Until this has been done, he can safely rest his case, with the assurance of an acquittal and immunity from any sort of punishment. When the state has made out its case beyond such reasonable doubt, it may rest its case, and it then devolves upon the accused to offer such evidence as he may deem proper. This is discretionary with him. The courts will not compel him to do so: Code Crim. Proc., art. 660. As was previously said, we are not discussing the rule that the state should introduce the best evidence of which the case is susceptible. We hold that the state is not required to place every eye-witness on the

stand. It may make out its case sufficiently to justify a legal conviction, and proceed no further.

¹⁴⁶ The court charged the jury: "If Marcellano Lassano was making an unlawful assault upon one Jose Romero with a knife, and was seeking to cut said Romero with said knife in the presence of M. M. Hornsby, then said Hornsby had a right to interfere to prevent said Marcellano from cutting said Romero; and if, when Hornsby interfered to protect said Romero, said Lassano turned upon and assaulted Hornsby with said knife, then his son, Make Hornsby, had the right to interfere to prevent injury to his father, and the said Hornsby would have been authorized to use sufficient force to protect both said Romero and M. M. Hornsby from injury, and if they used no more force than was necessary to accomplish this end, then the defendant would not, under the law, be authorized to interfere to prevent the protection of said Romero and said Hornsby from said Lassano; and if the jury so find the facts to be, and further find beyond a reasonable doubt that the defendant, Francisco Reyons, saw the origin of the difficulty between said Lassano and Romero, and knew that Lassano was in no danger, but that the interference with him by the Hornsbys was simply to prevent his injuring said Romero or said Hornsby, and, knowing said facts, said defendant, Francisco Reyons, interfered, and with a sedate and deliberate mind and formed design to kill said M. M. Hornsby—that is, with express malice, as defined in the seventh paragraph of this charge—did, with a pistol, shoot and thereby kill said M. M. Hornsby, then the defendant would be guilty of murder in the first degree." Exception was reserved to this portion of the charge, because "the evidence shows, or leaves in question, the fact to be whether the defendant, after seeing the inception of the difficulty, did not think it ended as to Lassano and Romero, and when called to assist Lassano supposed him assaulted by the Hornsbys unlawfully." We think this an admirable application of the law to the facts of this case. If appellant was aware of the origin of the difficulty, he was evidently aware of the intention of the deceased and his son. He knew deceased had seized Lassano for the purpose of preventing him from murdering Romero. He also knew that Make Hornsby, the son of the deceased, was engaged in the same business, or to protect his father from the murderous assault of Lassano. Neither of the Hornsbys had inflicted a blow upon Lassano, but were

holding him to prevent him from killing Romero. But a very short time elapsed from the time Lassano drew his knife for the purpose of taking the life of Romero until the deceased was killed by appellant, and if, when deceased was killed, Lassano had abandoned his intention to kill Romero, he was evidently intending to use his knife upon the Hornsbys. The acts and intentions of Lassano were well known to appellant, for he witnessed the whole transaction. The facts did not call for a charge on the law of manslaughter; wherefore the court did ¹⁴⁷ not err in refusing to submit such issue to the jury. This question was settled on the former appeal.

The motion for continuance was properly overruled, and this seems to be conceded, inasmuch as it is not urged in brief of counsel. The witness Frank Flores was not present at the place of the killing, and the testimony of the witness Soldonio is not probably true, if sworn as stated in the application. The evidence of the witness Ureal is too generally stated. If he was present at the time and place of the homicide, the facts expected to be proved by him should have been stated in some other manner than mere conclusions: Willson's Criminal Statutes, sec. 2165; *White v. State*, 32 Tex. Crim. Rep. 625. We deem it unnecessary to review the evidence. If the testimony adduced by the state be true, then the jury were justified in their verdict.

The judgment is affirmed.

Judges all present and concurring.

WITNESSES—DUTY OF PROSECUTION TO CALL.—The prosecution is not bound to call every witness present at the transaction which is the subject of the indictment: *Hill v. Commonwealth*, 88 Va. 633; 29 Am. St. Rep. 744, and note.

HOMICIDE IN DEFENSE OF ANOTHER.—One brother is justified in interfering in the defense of another when the latter is in an angry struggle with a third person, who attempts to possess himself of a club with the apparent purpose of using it on the brother. The brother thus interfering is justified not only in seeking the club, but, if necessary for the protection of his brother, in striking with it: *Snell v. State*, 29 Tex. App. 236; 25 Am. St. Rep. 723, and note. See, also, the note to *Stanley v. Commonwealth*, 9 Am. St. Rep. 308.

TRIAL—CONTINUANCE—ABSENCE OF WITNESSES.—An application for a continuance on account of the absence of a witness should not be granted unless the application shows diligence to secure the attendance of the witness, and states definitely the facts expected to be proved by him: *Miller v. State*, 31 Tex. Crim. Rep. 609, 37 Am. St. Rep. 836. To entitle a party to a postponement of his trial on account of the absence of witnesses, it is

necessary to satisfy the court that the persons are material witnesses; that the party applying has been guilty of no laches, and that there is a reasonable expectation of being able to procure their attendance at the future time prayed for: *Hyde v. State*, 16 Tex. 445; 67 Am. Dec. 630, and note.

JACKSON v. STATE.

[88 TEXAS CRIMINAL REPORTS, 281.]

WITNESSES—IMPEACHMENT OF ACQUITTED CODEFENDANT.—If the credibility and standing of a person who has been a codefendant with a party charged with crime is attacked while he is testifying in behalf of the accused, by evidence that he has been charged with such crime, he has the right to prove his acquittal of such charge, and it is prejudicial to the accused to deny such right.

WITNESSES—IMPEACHMENT—REBUTTAL OF.—If the credibility of a witness is attacked by evidence that he has been charged with crime, he has a right to prove his acquittal of that charge.

WITNESSES—IMPEACHMENT BY CONTRADICTIONARY STATEMENTS.—If part of the written evidence of a witness is introduced for the purpose of impeaching him, the whole of such evidence is admissible, if necessary to explain or throw light on that point used to discredit him.

WITNESSES—IMPEACHMENT BY REPORT OF EVIDENCE AT PRELIMINARY EXAMINATION.—The testimony of a witness taken at a preliminary examination, and totally at variance with his evidence as given at the final trial, is admissible for the purpose of impeaching him, although he denies the correctness of the record of the testimony first taken, denounces it as false, and states that he never read it, and that if he had read it he would not have signed it.

WITNESSES—IMPEACHMENT.—CREDIBILITY OF DEFENDANT TESTIFYING IN HIS OWN BEHALF may be impeached by compelling him to answer on cross-examination that he has previously been arrested for other crimes.

WITNESSES.—DEFENDANT TESTIFYING IN HIS OWN BEHALF MAY BE CONTRADICTIONED, IMPEACHED, and sustained in the same manner, and occupies the same place, and is to be treated the same as other witnesses. He is liable to cross-examination as to any matter pertinent to the issues on trial.

WITNESSES—PRESUMPTION.—DEFENDANT TESTIFYING IN HIS OWN BEHALF is presumed to tell the truth, but this presumption may be overcome in his case the same as in the case of any other witness.

WITNESSES—IMPEACHMENT.—IF DEFENDANT, TESTIFYING IN HIS OWN BEHALF, answers on cross-examination a question tending to disgrace him, the cross-examining party is bound by such answer, if collateral to the issue and only going to the credit of the witness.

285 DAVIDSON, J. Appellant, Thompson, and Moore were jointly indicted for the crime of robbery. Thompson was tried and 286 acquitted. While testifying in behalf of appellant this fact was sought to be proved by this witness, but, on objection by the state, was rejected. This was error. His

complicity in the robbery was kept prominently before the jury throughout the trial. This tended clearly to affect and impair the force of his testimony. Proof of his acquittal would have tended to place him in a much more favorable light before the jury, and it was of the greatest importance to appellant that this should be so. When the credibility and standing of a witness have been attacked by evidence that he had been charged with an infamous crime, it certainly is admissible to prove his acquittal of that charge.

Appellant introduced portions of the testimony of Dick, the party charged to have been robbed, taken before the examining court, for the purpose of contradicting or impeaching him. The state was permitted to introduce the whole of his evidence taken on said trial. This testimony is not set out in the bill of exceptions, and it is therefore impossible for us to tell whether it was or was not erroneously admitted: Willson's Criminal Statutes, secs. 2368, 2516. If this testimony was necessary to explain or throw light upon that portion of the evidence used to discredit the witness, it was clearly admissible.

For the purpose of contradicting the witness Goode, the state introduced his testimony taken in the same examining court. Objections were based upon Goode's denial of the correctness of the record offered, and his statement that it was false; that he had not read it before signing it; and that, had it been read to him, he would have declined to sign it. This testimony was, it seems, totally at variance with his evidence on the final trial. For the purpose for which it was used, this testimony was correctly admitted.

On his cross-examination appellant was made to answer that he had been previously arrested for burglary, robbery, and theft. Exceptions were reserved. A defendant may testify in his own behalf, and this though he may remain unpardoned for conviction of an infamous crime: *Williams v. State*, 28 Tex. Crim. App. 301; *Shannon v. State*, 28 Tex. Crim. App. 474; *Newman v. People*, 63 Barb. 630; *Morgan v. State*, 86 Tenn. 472; Wharton's Criminal Evidence, 9th ed., sec. 429. He may be contradicted, impeached, and sustained in the same manner, and occupies the same place, and is to be treated as other witnesses: *McFadden v. State*, 28 Tex. Crim. App. 241; *Huffman v. State*, 28 Tex. Crim. App. 174; *Quintana v. State*, 29 Tex. Crim. App. 401; 25 Am. St. Rep. 730; *Mendez v. State*, 29 Tex. Crim. App. 608; *White v. State*,

30 Tex. Crim. App. 652; *Ferguson v. State*, 31 Tex. Crim. Rep. 93. He need not testify—is not compelled to do so—but when he does his credibility is subject to like attacks as other witnesses. Mr. Wharton says: “It has been ruled also that to affect his credibility he may be asked whether he has been in prison on other charges”: Wharton’s Criminal Evidence, 432, 287 and note 5; *McGarry v. People*, 2 Lans. 227; *Brandon v. People*, 42 N. Y. 265; *Connors v. People*, 50 N. Y. 240; *People v. Casey*, 72 N. Y. 393; *Quintana v. State*, 29 Tex. Crim. App. 401; 25 Am. St. Rep. 730; *McFadden v. State*, 28 Tex. Crim. App. 241. In *Peck v. State*, 86 Tenn. 259, the supreme court of Tennessee said: “Surely the courts would be slow to place a construction upon an act of the legislature (if there were room for construction) that would allow a witness to be sworn, and give his testimony against that of a good and true man, when the state’s attorney knows and is ready to prove him wholly devoid of moral sense and utterly unworthy of belief, and, at the same time, prevent the state from showing the character of the witness as affecting his credit. Under this act a man repeatedly convicted of the crime of perjury can go before the jury, in a community where he is unknown, and, with a good manner and fair exterior, give evidence in his own behalf, and the state remain powerless to impeach him, if the position contended for were tenable. Prior conviction of an infamous crime does not incapacitate him as a witness.” He may be asked “whether he has suborned testimony in the particular case, and whether he has been concerned in other crimes, part of the same system”: Wharton’s Criminal Evidence, 432, and notes.

The decisions are practically harmonious to the effect that the defendant as a witness occupies the same position as any other witness; is liable to be cross-examined as to any matter pertinent to the issues of the trial; may be contradicted, impeached, and sustained as any other witness, and is subject to the same tests: See *Quintana v. State*, 29 Tex. Crim. App. 401; 25 Am. St. Rep. 730, for collated authorities. This court, after mature deliberation, held that the credibility of a witness can be attacked by evidence that he has been charged with the commission of an infamous offense, or that he has been arrested for a crime involving legal and moral turpitude: *Carroll v. State*, 32 Tex. Crim. Rep. 431; 40 Am. St. Rep. 786; *Goode v. State*, 32 Tex. Crim. Rep. 505; *Lights v. State*, 21 Tex. Crim. App. 308. See, also, *People v. Rodrigo*,

69 Cal. 601; *Hollingsworth v. State*, 53 Ark. 387. The status of the accused as a witness being determined and fixed as other witnesses, it would follow, under the rule laid down in the Carroll case, that he is subject to the same rules and tests. The decisions are hardly reconcilable upon any other theory. Again, every witness is presumed to be truthful. This presumption, like all presumptions, may be overcome. This presumption applies alike to all the witnesses who testify. It would hardly be asserted that the presumption of truthfulness does not apply to the accused, for this would abrogate the rule that he stands upon the same equality with the other witnesses. If he is presumed untruthful it would be wholly unnecessary to attack his credibility, and his evidence would be wholly unnecessary and worthless, and the statute authorizing his testimony ²⁹⁸ worse than foolishness. Or, if he be exempt from the same attack as the other witnesses, then to that extent the presumption of truthfulness becomes conclusive, and therefore binding upon the courts and juries. The law, however humane in guarding the rights of the accused while on trial, certainly did not intend to clothe the presumption of his truthfulness in any particular with an unapproachable and inviolable sanctity. Again, it is permissible, when tending to establish identity, intent, or to develop the *res gestæ*, to prove contemporaneous crimes. And this may also be done when the object is to show system: *Hennessey v. State*, 23 Tex. Crim. App. 340; Wharton's Criminal Evidence, 9th ed., 38. These matters may be shown by any competent evidence or witness—even by the defendant himself. In such state of case, the purpose of such proof must be explained to the jury in the charge of the court. It would seem that when such evidence is admitted for the purpose indicated the charge limiting its purpose is required in order to prevent a conviction of an offense for which the accused is not then being prosecuted. So, if the accused is required to testify to such facts, either as original evidence or to affect his credit as a witness, the court should give appropriate instructions and inform the jury as to the purpose of admitting the testimony. When such testimony is sought only for the purpose of impugning the standing of the witness, and is denied by him, the answer is usually binding, and the party eliciting the answer is, in general, precluded from contradicting the witness as regards that particular question. As was said in *Carroll v. State*, 32 Tex. Crim.

Rep. 431, 40 Am. St. Rep. 786: "It is also to be observed that when a witness is asked a question which tends to disgrace him, and he answers that question, the cross-examining party is, in general, bound by the answer, if collateral to the issue and only going to the credit of the witness, for to admit contradicting evidence would raise collateral and independent issues not relevant to the main question": 1 Greenleaf on Evidence, 455; Best on Evidence, 100; 2 Phillips on Evidence, 950. The evidence was correctly admitted, and the court in the charge properly limited it to the office and purpose for which it was admitted.

The court should have omitted the charge given in relation to the use of deadly weapons. This means of committing the robbery was not averred.

The judgment is reversed and the cause remanded.

HURT, P. J., concurs.

MR. JUSTICE SIMKINS dissented, and said: "While I agree to the disposition of the case upon the other grounds, I am unable to concur with the majority of the court in holding that, when the defendant takes the stand in his own behalf, he thereby subjects himself to cross-examination to the same extent and in the same manner as any other witness. I readily concede he may be cross-examined as to all matters connected with the offense charged, or as to crimes contemporaneous or connected by system with the one under investigation; but I deny the right of the state to go, under claim of attacking his credibility, into the witness' past life, and bring before the jury charges and convictions having no relation to, nor connection with, the present charge. To admit testimony of the character above mentioned is to strip the defendant of the presumption of innocence the law has heretofore thrown about him, and renders his conviction a certainty in cases where doubt might otherwise exist. I have no doubt as to the correctness of the rule which permits a witness testifying for or against another person charged with crime to be examined as to his past life, so far as it may throw light on his present character for truth. The jury should know his surroundings and connections to properly weigh his testimony: *Carroll v. State*, 32 Tex. Crim. Rep. 431; 40 Am. St. Rep. 786. There is, however, a manifest difference as to result between the ordinary witness and the defendant witness. The ordinary witness has but his credibility at stake. Proof of his past life can alone affect that. But the defendant witness has at stake not only his credibility, but his liberty or life, and the testimony, under this rule of the court, may not only break down his credibility, but take away his life also. Nor does it follow, if such testimony is not admitted, that the presumption of truthfulness will surround the accused. On the contrary, there is no possibility of the jury forgetting that defendant is profoundly interested in the cause, with every incentive to conceal the truth if it is against himself; and defendant necessarily labors under a disadvantage that can attend no other witness. For these reasons I do not think the rule in the *Carroll* case should be extended to defendants testifying."

WITNESSES—IMPEACHMENT OF CODEFENDANT.—One of two indicted persons testifying in behalf of his codefendant may be impeached like any other witness: *State v. Hardin*, 46 Iowa, 623; 26 Am. Rep. 174.

WITNESSES—IMPEACHMENT—SWORN STATEMENTS BEFORE COMMITTING MAGISTRATE.—In some jurisdictions it is established that a deposition taken before a committing magistrate is receivable as original evidence on the trial of the accused for the alleged crime to discredit the witness who made it without cross-examining him concerning it: Extended note to *Allen v. State*, 73 Am. Dec. 768. A witness may be impeached by showing that he made statements before the grand jury contradictory of his evidence on the trial: *Ripsey v. State*, 29 Tex. App. 37.

WITNESSES—IMPEACHMENT OF DEFENDANT TESTIFYING IN HIS OWN BEHALF.—A person accused of crime testifying in his own behalf is subject to be contradicted, disputed, or impeached the same as any other witness: *State v. Duncan*, 7 Wash. 336; 38 Am. St. Rep. 888, and extended note. See the extended notes to *Commonwealth v. Nichols*, 19 Am. Rep. 348, and *State v. White*, 27 Am. Rep. 140.

WITNESSES—DEFENDANT AS—IMPEACHMENT—PREVIOUS CONVICTION OF CRIME.—A defendant who becomes a witness in his own behalf is to be treated as any other witness, and the record of his conviction of a former felony is competent, when introduced, to affect his credibility: *State v. Nelson*, 98 Mo. 414; *State v. McGuire*, 15 R. I. 23; *State v. Sauer*, 42 Minn. 258. See, also, the extended notes to *State v. White*, 27 Am. Rep. 140, and *Allen v. State*, 73 Am. Dec. 775.

KOENIG v. STATE.

[28 TEXAS CRIMINAL REPORTS, 367.]

INDICTMENT—IDENTIFICATION.—An indictment charging the accused with “playing cards in a house for retailing spirituous liquors” is sufficiently identified if the names of the parties and the proper number of the bill is stated, although the minutes of the court in which the indictment was first presented show that he was charged with playing cards in a public place.

CRIMINAL LAW—JUDICIAL KNOWLEDGE.—The district court is not charged with judicial knowledge that a crime named in an indictment was committed in an incorporated town or city if such fact is not alleged therein, nor that the city, if one is named, is incorporated, nor that a justice of the peace resides therein, so as to require it to transfer the case to the justice's instead of the county court, within the meaning of a statute requiring the district court to transfer cases beyond its jurisdiction, involving crimes committed in incorporated cities and towns, to a justice of the peace, if there is any therein.

CRIMINAL LAW—JURISDICTION.—If the district court transfers a case to the county court having jurisdiction to try the offense named, the jurisdiction of the latter court to try that particular case cannot be impeached in any way.

JUDGES—DISQUALIFICATIONS.—That the same question of law arises, or the same character of facts is involved in two prosecutions, does not dis-

qualify a judge from sitting in one by reason of his having been county attorney in the other.

GAMING—PUBLIC HOUSE.—THE CLUBROOM OF A PRIVATE INCORPORATED SOCIAL CLUB, in which liquors are sold only to members, and the receipts used only to keep up and replenish the stock of liquor for the club, is not a "public house" nor a "house for retailing spirituous liquors" within the meaning of a statute imposing a fine on any person who plays any game of cards in such house.

Crain, Kleberg & Grimes, for the appellant.

R. L. Henry, assistant attorney general, for the respondent.

371 HURT, P. J. By indictment, presented in the district court, appellant was charged with playing cards at a house for retailing spirituous liquors. Before he was arrested the indictment was, by order of the district judge, transferred to the county court. Appellant, having been arrested under process issuing from the county court, was tried in that court and convicted. He moved to quash the indictment, on the ground that the entry on the minutes of the district court showed that he was charged with playing cards in a public place, while the offense named in the indictment itself is playing 372 a game with cards at a house for retailing spirituous liquors. The matter presents simply a question of identifying the indictment; and the names of the parties, and the proper number of the bill being stated, there was no error in refusing to quash.

By plea to the jurisdiction appellant urged that, as the offense was committed in the incorporated city of Cuero, and there was a justice of the peace in said city, the cause should have been transferred to such justice for trial, and that the county court had no jurisdiction to try it; and in support of this contention he cites article 436 of the Code of Criminal Procedure. The decisions of this court settle this question. The district judge is not charged with judicial knowledge that the offense was committed in an incorporated town or city—that fact not being alleged in the indictment—nor that a city, if named, is incorporated, nor that a justice resided in such city. When the district judge has transferred the cause to the county court, and that court has jurisdiction to try for the offense named, the jurisdiction of that court to try the particular cause cannot in any way be impeached: *Patterson v. State*, 12 Tex. Crim. App. 222; *Temple v. State*, 15 Tex. Crim. App. 304; 49 Am. Rep. 200.

A question of the disqualification of the county judge to

try this case was raised by proper plea. The contention is that he, while county attorney, filed a complaint against certain parties, charging them with pursuing the occupation of selling spirituous, vinous, and malt liquors without first obtaining a license; that this was in the same building in which the offense charged in this indictment was committed, the question material in both cases being whether liquor was retailed; that the facts are identical, and identically the same question arises in both cases. There was no error in overruling the plea. That the same question of law arises, or the same character of facts are involved, in two prosecutions, does not disqualify a judge from sitting in one by reason of his having been county attorney in the other.

A serious and much-vexed question arises on the facts and the charge of the court in this case. The facts are undisputed. Appellant played a game of cards in the clubroom of a building known as "Turner Hall," situated in Cuero, on the date named in the indictment. The building is occupied and controlled by the Cuero German Turnverein, a private corporation chartered under the general laws of the state. By the terms of its charter, the purposes of the association are expressed to be: "Mental, moral, and physical improvement of the stockholders, their families, and others; to promote generally the diffusion of the knowledge of literature, the arts and sciences, and to encourage social and friendly intercourse." Under the by-laws members are elected by ballot. Members have a right, with their families, to visit the hall, take part in all festivities of the association, and introduce strangers as guests. The name and residence of a guest must be entered ³⁷³ on the guest-book, with the name of the member introducing him, who will be held responsible for his good conduct. A person who has sojourned in Cuero thirty days cannot be introduced as a guest unless he has made application for membership. The fee for membership is ten dollars. In addition, an assessment of fifty cents per month from each member is levied to meet the expenses of the association, and provide for the comfort and pleasure of the members. The employees in charge of the bar, or the messenger of the same, are positively forbidden to receive any money from others than members. The management of the hall, bar, and grounds is under the director elected for that purpose. The capital stock of the association is fixed at four thousand dollars, divided into ten-dollar shares. Such are

the purposes and management of the association, as exhibited by its charter and by-laws. The building we have mentioned consists of a large hall, a stage, and a clubroom in the basement. The hall is used for theatricals, private parties, dancing, conventions, and lectures. The best people of the community go there to listen and attend public and private dances and ice-cream festivals. Hall rent is charged to professional troupes, and nominal rent to private parties. The theatricals and conventions and the hall rent are the chief income of the association. The clubroom contains all the fixtures and appliances of a first-class barroom—counter, glasses, ice-chest, billiard-table, etc. The supply of spirituous, vinous, and malt liquors for the exclusive use of the members is kept, and sold only to members by the drink, by the steward, at five and ten cents per drink, which is either paid in money or charged to the member and collected at the end of the month. The money thus paid by members is paid by the steward into the general fund of the association, but is chiefly used in replenishing the stock of liquors. The bar is run at a loss, it not being the intention to run the bar for profit or to conduct the same as a business or calling, but simply for the convenience of members. The steward has strict instructions from the directors not to sell liquors to any stranger for any consideration. Such instructions are rigidly observed, but sometimes members buy liquor at the bar and take it away on a waiter, and the steward does not know what becomes of the liquor; and it may thus happen that at times strangers get liquors, but they do not buy or purchase them. The liquors are principally sold to members on Sunday, and at night on week-days. More is sold on Sunday than on any other day. The billiard-table is used only by members, and no fees are charged, and no betting thereon. Other tables are in the clubroom, and are used by members only for playing social games of cards, and no table fees are charged. The clubroom is also supplied with the papers, periodicals, and magazines of the day, and some members resort there to read and converse only. The room is orderly and quiet, and is visited by members, who are the leading and best people of Cuero. The windows of the building are stained, ³⁷⁴ and no one on the outside can see what is going on inside. The doors to the clubroom are generally closed during the performances or public meetings, and it is a private place, inasmuch as no stranger is admitted unless he

lives outside the city and is introduced as a guest of a member, and then such stranger cannot buy any liquor at the bar of the club. To the east of the building is a lawn, on which the association has a gymnasium. The lawn is often used for church fairs and festivals. During these festivals the doors of the clubroom are kept closed, and no one except a member has access to it. But the members do not stop playing cards in the clubroom while the festivals are going on. There are seventy-five or one hundred members. The association pays no occupation tax or liquor tax, either to the state, county, or city, but does pay the United States revenue tax as liquor dealer. The liquor and bar fixtures are all the property of the association. The association has been conducted as above since 1879.

This is the uncontradicted testimony of the steward. The secretary of the association corroborated in every respect the testimony of the steward, and further testified that the association was not organized to evade the license laws of the state. It is a social club, whose members may indulge in a social glass without resort to barrooms. The liquors are not kept for the purpose of obtaining revenue, and the payments made by members are put into the general fund. The so-called "bar" is run at an absolute loss, the loss for the past year being about five hundred dollars. The members carry out, in letter and spirit, the object of the corporation as stated in the charter.

These being the facts, the court charged the jury, that it "makes no difference, under the law, whether the liquors were retailed in a private clubroom, in an open saloon, or in a private residence, and regardless of the persons to whom or how the spirituous liquors were sold—whether to members only or to the public generally." And again: "If you believe that the Cuero German Turnverein is an incorporated institution under the laws of this state, and in that case, if so, it becomes an artificial person, and can own and hold, buy and sell, property as individuals; and if you further believe . . . that such turnverein kept and dispensed spirituous liquors, through an agent, janitor, or a steward, to individual persons, and that said liquors were paid for in money or charged to the individuals, then the acts of the body corporate, through its agent, janitor, or steward, and the individual, in dispensing and obtaining the liquors, constitute a sale and purchase under our law, regardless of whether

the individual is a member of the incorporated body or not." The charge was excepted to on the ground that it was erroneous in defining a house for retailing spirituous liquors. The effect of the court's charge was to tell the jury to convict appellant on the facts in evidence, and the question for us to determine is, Do the acts show a violation of the statute? ²⁷⁵ The playing at a game of cards being an admitted fact, the question is narrowed to this: Was the clubroom in question a house for retailing spirituous liquors within the meaning of article 355 of the Penal Code? That article reads: "If any person shall play at any game with cards at any house for retailing spirituous liquors, storehouse, tavern, inn, or any other public house, in any street, highway, or other public place he shall be fined." The next succeeding article is explanatory, and reads: "All houses commonly known as public, and all gaming-houses are included within the meaning of the preceding article. Any room attached to such public house and commonly used for gaming is also included, whether the same be kept closed or open. A private room of an inn or tavern is not within the meaning of public places, unless such room is commonly used for gaming; nor is a private business office or a private residence to be construed as within the meaning of the public house or place; provided, said private residence shall not be a house for retailing spirituous liquors."

We have no decision in Texas upon the question, nor do we find any decisions of other states directly in point. There is a line of decisions, however, which serves to illustrate and throw light upon the subject. In Maryland the statute (Laws 1866, c. 66) provides that "no person in this state shall sell, dispose of any spirituous liquors or beer on the Sabbath day," and a penalty was fixed. The officers of a corporation known as the Concordia were indicted for selling beer on Sunday. The purpose and management of the Concordia were in all respects the same as that of the Turnverein in this case. It was admitted that one Springer, a member, at the time and place alleged, called for a glass of beer in the usual way, was served by the steward, drank it then and there, and paid five cents therefor, that being the price fixed by the corporation. The supreme court of that state say: "We are all of the opinion that the transaction was not a sale of beer to Springer within the intent and meaning of the statute. . . . The act has no ap-

plication to a case like the present." "The license laws which forbid the sale or barter of spirituous or fermented liquors without a license have never been construed as applicable to a social club. . . . We think it clear that no license is required, for the reason that such a transaction is not a sale within the meaning of the license laws. Such a transaction is not a barter or sale in the way of trade": *Seim v. State*, 55 Md. 566; 39 Am. Rep. 419.

In Massachusetts the defendant was charged with keeping and maintaining a common nuisance, to wit, "a tenement used for the illegal keeping and illegal sale of intoxicating liquors." The supreme court said: "If the liquors really belonged to the members of the club, and had been previously purchased by them or on their account of ³⁷⁶ some person other than the defendant, and if he merely kept the liquors for them, and to be divided among them according to a previously arranged system, these facts would not justify the jury in finding that he kept and maintained a nuisance within the meaning of the statute under which he is indicted. There would be neither selling nor keeping for sale." "If the whole arrangement was a mere evasion, and the substance of the transaction was a lending of money to the defendant, that he might buy intoxicating liquors to be afterward sold and charged to the associates, or if he was authorized to sell, or did sell, or keep, any of the liquors, with the intent to sell to any persons not members of the club, he might well be convicted. This, however, would be a question not of law, but of fact": *Commonwealth v. Smith*, 102 Mass. 147.

In the case of *Commonwealth v. Pomphret*, 137 Mass. 564, 50 Am. Rep. 340, the complaint was for keeping liquors with intent unlawfully to sell the same. The trial judge charged as follows: "If the association of persons, of whom defendant was one, owned a quantity of liquors, which they kept under an arrangement to furnish them in such quantities as might be required, to be drank on the premises, to such members of the association as should call for them, in return for checks which represented certain values, and which were obtained from the defendant, as a steward of the association, and were paid for, when obtained, at the price they purported to represent, and defendant was one of the persons keeping these liquors for said purpose, and was personally in charge of them, furnishing them in return for said checks, the jury

may find that said liquors were kept by him for unlawful sale." The supreme court said: "One inquiry always is, whether the organization is bona fide a club with limited membership, into which admission cannot be obtained by any person at his pleasure, and in which the property is actually owned in common. . . . *Graff v. Evans*, 8 Q. B. Div. 373, was decided on the ground that there was no transfer of a special interest, as all members of a club were owners in common, and, as the club was a bona fide club, the furnishing of liquors to a member was not a sale within the meaning of the English licensing act. . . . The ruling and instruction in this case seemed to us to assume that this was a bona fide club, that the liquors were owned in common by the members, that they were furnished only to members, and they were kept by the defendant as one of the members and as steward of the association. It does not appear in the exceptions in what manner new members were admitted, except that they paid an admission fee of one dollar, but we cannot assume that any person could join the association at his pleasure; and the ruling and instructions are not put upon the ground that there was evidence that this was an association open to anybody at a price. On the assumptions upon which we understand the instructions to proceed, we think ³⁷⁷ that, under the decision in *Commonwealth v. Smith*, 102 Mass. 147, it was not competent for the jury to find the defendant guilty."

In a later case in the same state, the instruction of the trial judge was to the effect that if the club was a bona fide club, and the liquors owned in common by the members, and the members, on receiving liquors, gave money in return, it would not be a sale within the meaning of the statute; but if this is a mere device to cheat the government out of its license fees, and prevent the due execution of the law, it is not a protection, and the defendant does not act with impunity. The supreme court held that the charge correctly presented the law: *Commonwealth v. Ewig*, 145 Mass. 119.

In a case before the supreme court of New York, the principles enunciated in the foregoing cases were approved, and the cases, with many others to the same effect, were cited. However, in the case before the court, the facts did not bring it within the rule. The ball given by the club was not confined to the members, inasmuch as the tickets were sold to any one who would buy, and the liquors were indiscriminately

sold to persons admitted, and desiring them. "The Academy of Music," said the court, "ceased to be a private clubhouse for the period during which the ball continued, the entrance to which, and privileges therein, were not confined to its members and their guests in the proper and legal sense of that term": *Circle Francais de L'Harmonie v. French*, 44 Hun, 123.

In Virginia a statute (Acts 1889-90, p. 242, et seq.) provided that "no person, corporation, company, firm, partnership, or association shall, within the limits of this state, engage in the business, sell, or offer to sell, ardent spirits," without first having obtained a license. It was further provided that "any person, club, or corporation desiring to carry on the business of a retail liquor merchant and also that of a barroom shall obtain a separate license for each." The Piedmont Club was indicted for selling liquor without license. It was conceded that it was a bona fide club, organized for the purpose of evading the law. None but members or invited guests are entitled to the privileges of the club, and no person not a member is permitted to pay for either food or drink. The money received from the liquors goes into the general fund, which is again used to replenish the stock. No profit is made on the liquor. The supreme court said: "What is complained of as an unlawful selling is nothing more than an equitable mode by which the cost of the liquor used by members is divided among them in proportion to the quantity that each one uses. . . . If there can be said to have been, in the strictest or most technical sense, a sale at all, it was not such a sale as the statute contemplates. The defendant club, in dispensing liquors to or at the expense of its members, was not engaged in carrying on the business of selling ³⁷⁸ liquor": *Piedmont Club v. Commonwealth*, 87 Va. 540. In a recent case the supreme court of South Carolina reviewed the above cases, and approved them: *Columbia Club v. McMaster*, 35 S. C. 1; 28 Am. St. Rep. 826.

To the same effect are the cases of *Tennessee Club v. Dwyer*, 11 Lea, 452; 47 Am. Rep. 298; *Barden v. Montana Club*, 10 Mont. 330; 24 Am. St. Rep. 27. From these cases the principle is deducible that the distribution of liquors by a bona fide club among its members is not a sale, within the inhibition of a liquor law, even though the person receiving the liquor give money in return for it. It is otherwise, however, where

such club is simply a device resorted to as a means of evading the statute: See *Columbia Club v. McMaster*, 35 S. C. 1; 28 Am. St. Rep. 826; Am. & Eng. Ency. of Law, tit. "Intoxicating Liquor."

The case of *Rickart v. People*, 79 Ill. 85, is often cited to support the converse of the above proposition. The facts there made a case totally dissimilar to those we have reviewed and the one at bar. The members did not own the liquors, although they claimed to own them. The money received went to the pretended treasurer, who rendered no account to the members. Any one could become a member by paying a dollar. The court correctly held that the jury were warranted in finding it a mere device to evade the law. The case does not conflict with those above. The case of *Marmont v. State*, 48 Ind. 21, directly conflicts with the cases we have reviewed. It was there distinctly held that the delivery by the club, through its agent, of beer, which was the common property of the society, to a member of the society, upon credit or for cash, and which thereby became the separate property of the member, was a sale, within the meaning of the statute of that state. So, in Alabama, it was held that such a transaction was a sale: *Martin v. State*, 59 Ala. 34. To the same effect seems the opinion in the case of *Chesapeake Club v. State*, 63 Md. 446, by Alvey, C. J., and Judges Stone and Irving concurring. In the same case, however, Judge Bryan delivered an opinion, concurred in by Judges Yellott and Robinson, reasserting the doctrine in *Seim v. State*, 55 Md. 566, 39 Am. Rep. 419, and holding that "if, in this case, the whisky and beer which the appellant was charged with keeping was kept for the purpose of furnishing to its members under the circumstances above stated, there would be no violation of the statute." The statute referred to prohibited any person, company, or corporation, or association from depositing, or having in possession, any liquors, with intent to sell the same. The local option law was in force where the offense was alleged to have been committed. The circumstances of the transaction in question were not unlike the one before this court in any essential particular.

We are of the opinion that, upon authority and reason, it must be held, under the facts of the present case, the transaction was not a sale of the liquor in the way of trade, and that neither the association, its ³⁷⁹ members, nor its

steward were engaged in the occupation of selling liquors. If this be true, was the clubroom a place for retailing liquors? "To retail," in this connection must mean "to sell in small quantities." "A house for retailing" must mean "a house where the liquors are sold in small quantities in the way of trade." Again, our statutes regulating the sale of spirituous liquors recognize the distinction between selling liquors at retail and otherwise as an occupation. It is very clear, both from the decisions we have cited and our statutes, that the club, its members, or steward are not engaged in the occupation of selling liquors in quantities less than one quart. In the case made by the facts it is equally clear that no question of evasion of the laws, or of a device to conceal the real objects, purposes, and acts of the association, arises in this case. The dispensing of liquors to the members is but incidental, and for the purpose of adding to the pleasure and comfort of the members. Again, reference to the statutes shows that the places and houses named, and those intended to be embraced, are all "public." The statute contemplates public houses and public places. Was the clubroom of the association either? None but members and their guests could enter there or share its privileges. So long as this rule was enforced it was not public, and the evidence shows that the rule was strictly observed. We conclude that the evidence does not show that defendant played cards at a house for retailing spirituous liquors, within the meaning of the statute.

The judgment is reversed and cause remanded.

Judges all present and concurring.

IN THE CASE of *Winters v. State*, 33 Tex. Crim. Rep. 395, Winters was indicted and convicted in the lower court of unlawfully playing a game of cards in a public place, to wit, a house for retailing spirituous liquors. It was shown at the trial that such playing was done in the clubroom of an incorporated social club, where liquor belonging to the club was sold only to members, the receipts being used to replenish the stock of liquors for the club. It was held on appeal, on the authority of the principal case, that the conviction was not sustained by the evidence.

In the case of *Grant v. State*, 33 Tex. Crim. Rep. 527, under an indictment for playing cards in a "public place," it was shown on the trial that the card playing took place in the clubrooms of an incorporated commercial club, organized for the encouragement of public enterprises, to which, except on special occasions, only members or invited guests had access; that no gambling was permitted, and that the card playing consisted only of games for amusement among the members and guests, on occasions other than when the public was admitted. On an appeal from a verdict of con-

viction, the appellate court held that the verdict must be set aside, as such rooms were not a "public house" within the meaning of the statute.

EVIDENCE—JUDICIAL NOTICE—INCORPORATED CITIES.—The situation, boundaries, powers, and jurisdiction of cities created by statute will be judicially noticed by the courts of the state: Extended note to *Lanfear v. Mestier*, 89 Am. Dec. 667, 680. Acts creating municipal corporations are public acts, of which courts will take judicial notice: *Prell v. McDonald*, 7 Kan. 426; 12 Am. Rep. 423; but, where every locality of two hundred inhabitants may incorporate itself as a town, the courts will not take judicial notice of such incorporation: *Temple v. State*, 15 Tex. Ct. App. 304; 49 Am. Rep. 200, and note.

JUDGES—DISQUALIFICATION.—PREVIOUS CONNECTION WITH LITIGATION: See the notes to *Ex parte Harris*, 23 Am. St. Rep. 550, and *Roy v. Horsley*, 25 Am. Rep. 540. Acting as advocate and giving counsel in a matter is good cause of disqualification of a judge in a case arising out of such matter after his appointment as a judge: *Moses v. Julian*, 45 N. H. 52; 84 Am. Dec. 114; *Newcome v. Light*, 58 Tex. 141; 44 Am. Rep. 604.

ASSOCIATIONS—SELLING LIQUORS IN SOCIAL CLUBS.—The distribution of liquors at cost by a bona fide unincorporated social club to its members is not a sale for which a license can be required, under a general liquor law not specially mentioning such clubs: *Columbia Club v. McMaster*, 35 S. O. 1; 28 Am. St. Rep. 826, and note. To the same effect see *Barden v. Montana Club*, 10 Mont. 330; 24 Am. St. Rep. 27, and extended note.

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[23 TEXAS CRIMINAL REPORTS, 492.]

INSTRUCTIONS—ALL ISSUES MUST BE PRESENTED.—Whatever may be the views entertained by a court as to the truth or falsity of evidence adduced, it is incumbent on it to charge the jury, under appropriate instructions, on the law applicable to every phase of the testimony adduced on the trial.

HOMICIDE—INSULT TO FEMALE—MANSLAUGHTER.—Under a statute providing that "insulting words or conduct of the person killed toward a female relative of the party guilty of the homicide is deemed adequate cause to reduce the offense from murder to manslaughter, if the killing took place as soon thereafter as the party killing may meet with the person killed after having been informed of such insults," the law prescribes no limit to the subsidence of the passion supposed to have been engendered by the information received up to the time of the first meeting, provided the passion is such as renders the mind incapable of cool reflection, and actually exists from adequate cause at the time of the killing.

HOMICIDE—INSULT TO FEMALE—MANSLAUGHTER.—On a trial for a killing by the accused upon the first meeting with the party killed after information of insulting words or conduct by the latter toward a female relative of the former, the failure of the court to submit the issue of manslaughter to the jury is error, and is tantamount to deciding the extenuating evidence of the accused against him.

HOMICIDE—INSULT TO FEMALE—MANSLAUGHTER.—On the trial for a killing by the accused on the first meeting with the deceased after receiving information of insulting conduct by the latter toward a female relative of the former, the facts must be viewed from the standpoint of the accused, and if adequate cause and passion existed in his mind his crime could be of no higher grade than manslaughter, although the insulting conduct had never occurred, provided he believed it had.

HOMICIDE—INSULT TO FEMALE—MANSLAUGHTER—EVIDENCE.—On a trial for murder evidence that the deceased had committed a rape on the wife of the accused prior to his marriage is admissible upon the issue of manslaughter raised by a defense that the killing was caused by insulting conduct by the deceased toward the wife of the accused, both prior and subsequent to his marriage.

HOMICIDE.—JUDGMENT OF APPELLATE COURT REFUSING BAIL in a murder case does not deprive the accused of his right, upon final trial, to have all legitimate issues raised by the evidence passed upon by the jury, nor conclude the trial court from submitting to the jury the question of lesser degrees of homicide than murder in the first degree, suggested by the evidence. On final trial the case must be tried in the same manner and under the same rules of law as if it had never been before a court for any purpose, unless some question of evidence is settled by the appellate court in refusing bail.

MURDER—CONDITION OF MIND QUESTION FOR JURY.—Whether the mind of the accused is cool, or disturbed and enraged at the time of the killing, is a question of fact and not of law, and relates to the actual condition of mind at that time, and not to its status merely from lapse of time between the provocation and the killing, although such lapse of time may enter into the case as a fact to be determined by the jury.

493 **DAVIDSON, J.** Appellant was convicted of murder in the first degree, his punishment being assessed at a life term in the penitentiary. In extenuation of the homicide he introduced evidence to show the killing occurred on account of insulting conduct toward his wife. In this connection it was testified by the wife of the accused that while she was a widow, and prior to her marriage with appellant, the deceased, W. G. Veal, approached her bed and had enforced sexual intercourse with her; that deceased, subsequent to her marriage to appellant, visited her home, knocked at the door, and was admitted by the servant girl; and upon another occasion visited her house. Both visits occurred in the absence of her husband. Testifying in regard to the former visit, Mrs. Jones said: "Captain Veal came in and spoke to me. I don't remember what he said. I suppose he said, 'Good morning,' or 'Good evening.' I stood up and said, 'What do you come here for? You know you are not welcome in my house.' He did not leave then right away. I do not know what he said, exactly. I kept insisting and

tried to drive him or kept trying to get ⁴⁹⁴ him to go away, saying I did not want him there, or something like that. He turned as if he would go, but stood a moment, and then he came toward me. He came toward me just this way, with his arms stretched out. [Witness stood up and showed how it was.] I said, 'Don't you come here, Captain Veal. You forget where you are. You forget that I have a husband to protect me.' He turned and left the room." In reference to the second visit, she stated: "About eight years ago he came to my house again. . . . This was in the daytime, too, but I do not know what time in the day, or the date. I was in the kitchen then, busy at work. One of my little children came into the kitchen, and said, 'Mamma, there is a gentleman at the door.' I went out there without knowing or dreaming who it was. He was standing in the front door, and I only went as far as the back door, and I saw him there, and I said, 'What do you come here for? You know it makes me miserable to see you. You know better than to come to my house.' It seems to me that he said something, but I do not remember what it was. I think he remarked that he was taking a walk, and thought he would come in and see how I was getting along, or something like that. He did not make any movement or gesture toward me, but turned and left the house."

About a year before the homicide these matters were communicated to the appellant by his wife, and produced a decided and marked impression upon his mind and life, as testified by the wife, and thenceforward his life and conduct underwent a great change. Speaking of the effect of her communication to her husband, she testified, that "Dr. Jones was terribly shocked and distressed when I told him the story. He said, 'My God! How could it be true? How could it have happened?' He said, 'If an archangel had told me I could not have believed it. I could not have believed anybody on earth but yourself.' He did not sleep any more that night that I know of. I saw what effect it had on him, and I saw that he was so distressed I regretted telling him. I did not sleep any more myself. I always felt as if I could not die satisfied, and could never be utterly happy until I did tell him. I told him that I could not have died satisfied without telling him. These things have been the subject of discussion between Dr. Jones and myself often, both in the daytime and night, but mostly at night,

as he is away in the daytime most all the time. He could never speak of it without almost crying like a child. It almost unmans him. He was nervous and restless. He did not sleep well at night. He was just mortified and distressed more than he could bear, almost. I have noticed the expression of his eyes when he would speak about it. He always had a troubled and sad look and expression. He always seemed terribly grieved over it. He has not hardly seemed like the same man since. . . . All of this was not his way of doing before I told him."

495 While there is more of this same character of evidence, we have quoted enough to illustrate the question in regard to the failure of the court to instruct the jury upon the principles of manslaughter, and his refusal to give special instructions asked in this respect. There is a serious conflict in the testimony as to whether appellant had ever met deceased prior to the killing, after being informed of his conduct toward Mrs. Jones. Evidence was also introduced tending to show that appellant killed Veal because of reasons and motives other than the insulting conduct toward his wife. In regard to the condition of appellant's mind at the time of the homicide, the testimony is also conflicting. It was stated by some of the witnesses that he was very much excited, while others testified that he was not more so than a slayer would usually be when a homicide had been committed. There was a conflict in the evidence in regard to these various issues. In such state of case it is the duty of the court to instruct the jury in regard to the law applicable to the issues thus presented, leaving the weight of testimony and the credibility of the witnesses to be decided by the jury. Whatever may be the views entertained by a court as to the truth or falsity of evidence adduced, it is incumbent on him to charge the jury, under appropriate instructions, the law applicable to every phase of the testimony adduced on the trial. This is expressly commanded by the statute. To hold otherwise would authorize the trial judge to submit the law applicable only to such evidence as he might deem worthy of credit, discarding such as he believed unworthy of credence, and often, doubtless, thus impressing the minds of the jurors with the fact that the testimony was fabricated or false, and in this way it would be used strongly against the accused by the jury. The only safe rule is to follow the statutory law of the state in all criminal trials.

Under our statute, "insulting words or conduct of the person killed toward a female relative of the party guilty of the homicide" is deemed adequate cause to reduce a homicide from murder to manslaughter: Pen. Code, art. 597, subd. 4. In such state of case it is further provided that "it must appear that the killing took place immediately upon the happening of the insulting conduct or the uttering of the insulting words, or so soon thereafter as the party killing may meet with the person killed after having been informed of such insults." We are dealing, in this case, only with that clause of the statute which reduces the homicide to manslaughter when the killing occurs upon the first meeting after the party killing has been informed of the insulting conduct on the part of the party killed. It will be borne in mind that subdivision 1 of article 594, which provides "that the provocation must arise at the time of the commission of the offense, and that the passion is not the result of a former provocation," has no application to the case in hand. The insulting conduct ⁴²⁶ did not occur in the presence of Jones. He was informed of it, and in such state of case he could kill as soon as he should meet Veal after learning of the conduct, and be guilty of no higher crime than manslaughter, provided the other constituent elements of that offense were present. As was correctly said by Presiding Judge White in *Eanes v. State*, 10 Tex. Crim. App. 421: "Up to the time of his first meeting, the law prescribes no limit for the subsidence of the passion supposed to be engendered by the information received." The length of time in such state of case does not control the condition of the mind. If the killing takes place on the first meeting, then it is true in this, as in all other cases, that in order to reduce the offense to manslaughter it is necessary not only that the adequate cause (insulting words or conduct) existed to produce anger, rage, resentment, or terror in a person of ordinary temper sufficient to render the mind incapable of cool reflection, but such state of mind must actually exist at the time of the commission of the offense: Pen. Code, arts. 593, 602. "There must exist, not only the adequate cause, coupled with the defendant's knowledge of its existence, but the disturbed condition of the mind, and the necessary passion must also exist, in order to reduce the killing from murder to manslaughter": *Massie v. State*, 30 Tex. Crim. App. 64. "Adequate cause," unattended by the requisite "passion" rendering the mind incapable of cool

reflection, may become evidence of highly probative force, showing murder upon express malice. So, in this case, the court, having failed and refused to instruct the jury in regard to the insulting conduct, left this evidence bearing alone upon the question of murder. It then may have become evidence of a most cogent nature tending to show the killing to have been upon express malice; and the evidence adduced and relied on by him to mitigate his crime and punishment was resolved adversely to him by the action of the court refusing to submit the issue of manslaughter. The truth or probable truthfulness of his extenuating evidence was thus decided against him by the court. If the insulting conduct toward Mrs. Jones by Veal was the real cause of the homicide, or there was a reasonable doubt of that fact, and the killing occurred at the first meeting after the accused had been informed of such conduct, and, at the time of the killing, appellant's mind was in such a state of anger, rage, or resentment as to render it incapable of cool reflection, then his offense would be of no higher grade than manslaughter. This would be the case, although such insulting conduct had never occurred, provided appellant actually believed it had. The homicide, on the trial, must be viewed from the standpoint of the accused. The facts and circumstances should be analyzed and passed upon as they were viewed by him at the time he acted upon them. If, in this case, appellant believed the insulting conduct communicated to him by his wife actually occurred, as detailed ⁴⁹⁷ by her, then to his mind such conduct was a reality, and the charge should have been so framed as to submit this important issue to the jury. Men often act upon the most important affairs and interests in life upon mistakes of fact. They often risk honor, reputation, fortune and life upon mistakes of fact; of course, believing at the time they are not mistaken. The guilt of the accused party, in such state of case, should not depend upon the existence or nonexistence of the fact itself, but upon the circumstances as they appeared to and were understood by him at the time of his acting upon them. Such questions are matters of fact to be solved by the jury under appropriate instructions. That the insulting conduct had or had not occurred would have been immaterial if she had so informed Jones, and he believed her. If the jury should believe that Mrs. Jones informed her husband of the conduct of deceased toward her, and that his passions were

thereby aroused to the extent of rendering his mind incapable of cool reflection, and that, while his mind was thus inflamed, he shot and killed Veal upon first meeting with him after receiving such information, his offense would be of no higher grade than manslaughter. A solution of this question adversely to appellant would require a verdict of murder against him.

But it may be contended that Veal's conduct toward Mrs. Jones was not "insulting," within the meaning of the statute. To determine whether this conduct was or was not insulting, all the testimony bearing on that subject, or in any manner relating to it, should be looked to, including the rape alleged to have been perpetrated upon her by Veal prior to her marriage to appellant. This conduct tends to characterize the meaning, purpose, and object of his visits to her residence subsequent to the marriage. Considered alone, and apart from the rape, said visits, acts, and conduct, as above stated, may be of doubtful import. But, taken in connection with the rape sworn to by Mrs. Jones, its character is determined and fixed. If her relation of these matters is true—and its truth or falsity is a question of fact for the jury, and not this court in this proceeding—it would be reasonable and natural for appellant, believing the truth of her statements, to presume that the visits of deceased to his wife were for the purpose of gratifying his lustful desires. We have held the rape occurring before her marriage with appellant could not be relied upon to reduce the homicide to manslaughter; but we have not held that such rape could not be looked to for the purpose of giving character to his conduct toward Mrs. Jones occurring after marriage.

Again, it may be urged that all the facts, those relating to the rape as well as those occurring when deceased visited Mrs. Jones after marriage, were before this court, and bail refused, and therefore the court did not err in refusing to instruct the jury in regard to the law applicable to manslaughter. However plausible this may appear, it is wholly untenable, and is a very startling proposition. Carried to its logical conclusion and final analysis, the trial court, the facts being the same, should not submit the law applicable to murder of the second degree; and a refusal of bail by this court would preclude every issue save murder of the first degree. While murder of the second degree and manslaughter may be suggested by the evidence, this court may

nevertheless be convinced that the accused is guilty of murder of the first degree, and therefore refuse bail. But it certainly would not follow that, in such state of case, the jury would have no right to pass upon the issues thus presented on a final trial. The opinion of this court, refusing bail, is not conclusive upon these matters, nor does it preclude the accused from the right to have them submitted to a jury for their determination, when suggested by the evidence. Nor can the opinion of this court in such a state of case be substituted for that of a jury whose province it is, under the law, to pass upon the credibility of the witnesses and the weight of the testimony. That this proposition is correct is established by the fact that the almost universal practice of appellate courts is to refrain from commenting upon evidence refusing or granting bail on appeal. This practice or rule is founded upon the highest grounds of right and propriety, because such comments, if indulged, would reflect the opinion of the court in regard to the facts, and might improperly influence the jury upon the final trial of the cause.

In this connection, and bearing upon this subject, Judge Moore, in *Ex parte Miller*, 41 Tex. 214, said: "And as we are not authorized to analyze and weigh the testimony to ascertain and determine whether it preponderates in favor of or against appellant; nor can we speculate as to the conclusion to which the jury may come if the case was submitted to them on the evidence in the record before us; and since, whatever may be the conclusion which should be reached by those whose duty it may be to decide it, when appellant's guilt or innocence (or, if guilty, the degree of his guilt) comes to be finally determined, a careful examination of the record does not authorize us, in view of the conflict in the evidence as to the condition of appellant's mind at the time of the homicide, to say that the proof of his guilt of a capital offense is evident, we must hold that he is entitled to bail." Such also has been the practice of this court and its predecessor, the court of appeals. If the opinion of the appellate court refusing bail must conclude the trial court with respect to the propriety of submitting lesser degrees of homicide than murder in the first degree, though other degrees be suggested by the testimony, then why not permit a full discussion of the evidence by the appellate court? Why refrain from such discussion? By reference to the remarks of Judge Moore it will be

seen that the rule is fully recognized that, whatever may be the opinion of the court, district or appellate, with reference to the ⁴⁹⁹ guilt or degree of guilt of the party applying for bail, upon final trial the case must be tried in the same manner and under the same rules of law as if it had never been before a court for any purpose, unless some question of evidence is settled by the court on appeal for bail. In other words, every grade of crime, from murder in the first degree to negligent homicide, if suggested by the evidence, must, by proper instructions, be submitted to the jury. A doctrine more subversive of our law, more alarming in its tendency, and more fatal to that bulwark of Anglo-Saxon liberty, the jury system, could not be suggested than that this court could settle questions of fact for the jury, or that the opinion of this court must be taken as final against the accused—be substituted for that of the jury. Illustrative of the fallacy of such a doctrine, a case may be supposed wherein the accused, under an indictment charging him with murder, prosecutes his appeal from a refusal of bail, and, the judgment being affirmed, the court refuses on a final trial to submit only the law applicable to murder of the first degree. His complaint that murder of the second degree is suggested by the evidence, and the law applicable thereto should also be given in charge to the jury, is met by the proposition that the appellate court has settled this question adversely to him, and the charge is therefore refused. The latter proposition being correct, it would then be useless for him to urge, under the constitution and laws, that he had the right to be tried on the facts by a jury, for the reason that this court has settled the evidence against him. Whatever may be the views of a court as to the weight of the evidence or the credibility of the witnesses, such court cannot deprive the accused of the right of a trial by jury.

In defining "cooling time," the court charged the jury: "On the other hand, if the design to unlawfully kill has its inception and origin in an inflamed and excited mind, yet if there be sufficient time for the passion to subside and for reason to interpose, and a homicide be committed in pursuance of a design thus previously conceived, the offense is murder upon express malice, and therefore murder of the first degree." In applying the law to the facts in this connection, the following charge was given: "Or if, after considering the evidence, you shall believe that the defendant

conceived a design to unlawfully kill the said Veal, and that at the time of the forming of such design his mind was not sedate and deliberate, but was in a state of excitement, and should further believe that after the formation of such design, and before the killing of Veal, there was sufficient time, under the circumstances of the case, to enable the defendant to reflect and consider upon such design, and to comprehend the nature of the act and its probable consequences, and that the defendant killed said Veal in execution of such previously formed design, at the time and place and in the manner as charged in the indictment, you will find the defendant ⁵⁰⁰ guilty of murder of the first degree, and assess his punishment accordingly." These charges were promptly excepted to, and proper bills of exceptions reserved by appellant. In the final analysis of these instructions the question of "cooling time" is made a matter of law; that is, if a sufficient length of time, under the circumstances of the case, has elapsed for the mind to cool, as a matter of law it must be cool. We do not so understand the law, viewed in the light of our statutes. The condition of the mind at the time of a homicide is a question of fact, and it is fundamental in this state that the jury should view the homicide, as nearly as possible, as did the accused at the time he committed the act. The statute fixes no time in which an excited mind is required to become cool and sedate. This question must depend upon the facts attendant upon the particular case. In the case in hand a disturbing cause of some character was disclosed by the facts; hence the charge of the court. If it grew out of the insulting conduct toward Mrs. Jones, and the killing occurred upon the first meeting with the deceased after appellant was informed of such conduct, then the law has prescribed no limit for the subsidence of the passion supposed to be engendered by the information received by him of such insults: *Eanes v. State*, 10 Tex. Crim. App. 421. "The controlling question is whether the homicide was the result of passion upon adequate cause, or was done deliberately and upon premeditated design; and that is always a question of fact upon which the jury alone may speak": *Halliburton v. State*, 32 Tex. Crim. Rep. 51. See also, *Utzman v. State*, 32 Tex. Crim. Rep. 426. It is really not so much a question of time in which the mind may become cool and sedate, as it is one of the actual condition of the mind at the time the homicide occurs. The law has

not undertaken to prescribe the time in which the mind may become cool, passing from a disturbed or enraged condition, nor indeed can it well do so. This must depend upon testimony, and not law. There is, and should be, a strong correspondence between the principle which governs in regard to the provocation and the extent to which the passions are aroused thereby, on the one hand, and that which applies to the duration of the passion on the other hand, and both must depend upon the facts attendant upon the case on trial. No general rule can well be laid down in such cases, further than that it is a question of fact to be solved by the jury. Elementary authorities and adjudicated cases agree that time should be allowed in which the passions of the slayer may become calm, and the more rational line of authority is to the effect that the question ought to be left to the jury as to whether the mind had actually become quiet: *Ferguson v. State*, 49 Ind. 33-35; *Maher v. People*, 10 Mich. 213; 81 Am. Dec. 781; *Eanes v. State*, 10 Tex. Crim. App. 421; 3 Rice on Evidence, sec. 592.

501 The measure of responsibility under our statute is largely dependent upon the condition of the mind of the accused at the time of the homicide. If at the time of the homicide the mind of the slayer be calm, sedate, and deliberate, his crime would be murder in the first degree. If, on the other hand, it is aroused by sudden passion to the point of being beyond cool reflection, brought about by an adequate cause, the killing would usually be of no higher grade than manslaughter. Whether the mind be cool or otherwise is a question of fact, not of law, and relates to the actual condition of the mind, and not to its status merely from lapse of time: *Eanes v State*, 10 Tex. Crim. App. 421. That lapse of time may enter into the case as a fact may not be questioned. The vice in the charge is found in the fact that the court gave as a criterion for ascertaining the condition of appellant's mind the length of time intervening between the conception of the design to kill and the date of the homicide, instead of the actual state of the mind at the time of the killing. The instructions given substituted time for the actual condition of the mind, and made the criterion of murder of the first degree depend upon sufficient time for reason to resume its sway, instead of the fact that appellant's mind was cool and deliberate. The charge was erroneous.

The judgment is reversed and cause remanded.

HURT, P. J., concurs.

SIMKINS, J., expresses no opinion.

CRIMINAL LAW—INSTRUCTIONS—PRESENTING ALL ISSUES.—All law applicable to the evidence in the defense should be set forth in the charge to the jury: *Carter v. State*, 30 Tex. App. 551; 28 Am. St. Rep. 944, and note; *Snell v. State*, 29 Tex. App. 236; 25 Am. St. Rep. 723. On a trial for murder the instructions should distinctly set forth the law applicable to the case, not alone the case as made by the evidence for the prosecution, but the case as made by all the evidence, and especially the law applicable to any favorable evidence comprising defensive matter in behalf of the accused: *Mealy v. State*, 26 Tex. App. 274; 8 Am. St. Rep. 477, and note. A person charged with murder is entitled to have charges given which correctly state the law of his case, if they are supported by any evidence, however weak, insufficient, or doubtful in credibility it may be: *Gibson v. State*, 89 Ala. 121; 18 Am. St. Rep. 96. See, also, the note to *Campbell v. Commonwealth*, 21 Am. St. Rep. 355.

HOMICIDE—INSULTS TO FEMALE RELATIVE.—Where the statute provided that "insulting words toward a female relative" should be "adequate cause" to reduce homicide from murder to manslaughter, it was held that insulting words of and concerning such female relative, who was not present, was within the protection of the statute: *Hudson v. State*, 6 Tex. Ct. App. 565; 32 Am. Rep. 593. See, also, the case of *Levy v. State*, 28 Tex. App. 203; 19 Am. St. Rep. 826, where this subject is discussed incidentally.

HOMICIDE—STATE OF MIND—QUESTION FOR JURY.—What is reasonable or adequate provocation for such a state of mind as should give to a homicide committed under its influence the character of manslaughter is a question for the jury: *Maher v. People*, 10 Mich. 212; 81 Am. Dec. 781, and note. The question as to whether the act of killing was caused by passion is for the jury to pass upon: *Mealy v. State*, 26 Tex. App. 274; 8 Am. St. Rep. 477.

NEW TRIAL—CONDUCT OF SECOND TRIAL.—A new trial is the rehearing of the case before another jury, but with as little prejudice as if it had never been heard. It places the case exactly in the position it occupied before there had been a trial, and the party stands as if he had never been tried: *State v. Hornsby*, 8 Rob. 583; 41 Am. Dec. 314. See the extended note to *Commonwealth v. Arnold*, 4 Am. St. Rep. 177.

CASES
IN THE
SUPREME COURT
OF
TEXAS.

WESTERN UNION TELEGRAPH COMPANY v. LINN.

[87 TEXAS, 7.]

▲ **TELEGRAPH CORPORATION CANNOT BY ITS CONTRACT PROTECT ITSELF** from the consequences of the negligence of its servants in failing to deliver a message with reasonable diligence.

▲ **TELEGRAPH CORPORATION IS GIVEN SUFFICIENT NOTICE OF THE RELATIONSHIP** of the person to whom the message is directed and a person named therein when the message states that such person is very low and asks whether the addressee can come. The terms of such message notify the corporation that he is seriously interested in the condition of the person described therein as being very low.

THE DAMAGES FOR WHICH A TELEGRAPH CORPORATION IS LIABLE upon failure to transmit and deliver with proper diligence a message concerning sickness or death are such as fairly and reasonably may be considered as arising naturally, and according to the usual course of things, from a breach of its contract, or such as reasonably may be supposed to have been in the contemplation of the parties as a probable result of such breach.

TELEGRAPH CORPORATIONS—DAMAGES FOR WHICH NOT LIABLE.—From a message informing the addressee that another person was very low, and asking whether he could come, a telegraph corporation is not required to understand that the person so mentioned may die before the message is delivered, and that the addressee, were it delivered in proper time, might answer that he would come, and that upon such answer the funeral would be postponed until he could arrive. Hence, the corporation, though its negligence causes the nondelivery of the message at the proper time, is not answerable for damages arising from the consequent inability of the addressee to be present at the funeral.

Walton, Hill & Walton, for the plaintiff in error.

George F. Pendexter, for the defendant in error.

• BROWN, A. J. H. A. Linn sued the telegraph company to recover damages for mental suffering alleged to have been caused to him by the negligent failure to deliver in a reasonable time the following message, which was delivered to the agent of defendant at Benavides, Texas, January 5, 1891, for transmission:

“BENAVIDES, TEXAS, January 26.

“*To H. A. Linn, 1607 Lavaca, Austin:* Grace is very low. Can you come and bring Maude?

[SIGNED] “KATE.”

Petition alleged that Grace was a sister to plaintiff, and that she died on the same day that the message was delivered to defendant's agent at Benavides. That “Kate” and “Maude” were also sisters to the plaintiff. That the message was received by defendant's agent at Austin over its wires at 6:30 P. M. on the day of its date, but was not delivered until the next day, the 26th, at 9 o'clock A. M., and soon after receiving the said message he received from defendant another message informing him of his sister Grace's death, when, realizing that it was too late to reach Benavides in time for the funeral, he sent a message informing the family that the message was received too late for him to attend. The petition contained allegations sufficient to show the negligence of the defendant, ¹⁰ and also the following specific allegations upon which the questions involved in the demurrer arise:

“Plaintiff avers that if defendant had promptly delivered said message to him on the day it was received, as was its duty to do, that plaintiff would have at once sent a reply thereto, notifying his said sister Kate and his brother-in-law, the husband of said Grace, of his intention to leave Austin on the morning of January 26, 1891, for the purpose of visiting his said sister Grace, which he avers that he would have done but for the negligence and carelessness of the defendant as above set forth.

“And plaintiff avers that had said message been promptly delivered to him he could and would have left Austin on the morning of January 26, 1891, and would have reached Benavides by 11 o'clock on the morning of January 27, 1891. That his said sister Grace was buried at 4:30 o'clock on January 26, 1891, but that if said telegram had been promptly delivered to him by the defendant, so that he would have the opportunity of replying thereto on January 25th, and of an-

nouncing his intention of a visit to his said sister in response to said telegram, that the burial of said Grace would have been deferred until the afternoon of January 27, 1891, to enable plaintiff to be present thereat.

"Plaintiff further avers that the train leaving Austin on January 26, 1891, upon which he would have traveled to Benavides, departed before the delivery of said telegram to him by defendant, and that no other train left Austin upon which he could have made the trip until the morning of January 27th, so that after the receipt of said telegram by plaintiff it was impossible for him to reach Benavides until about 11 o'clock A. M. of January 28, 1891, to which time plaintiff avers it was impossible to defer the burial of his said sister.

"Plaintiff avers that but one train left the city of Austin on January 26, 1891, upon which it was possible for him to make direct connection with other lines of railroad running between said city and the town of Benavides.

"So plaintiff avers that on the delivery of the said telegram to him, and on the receipt of another telegram within one hour thereafter, informing him of the death of his said sister Grace, he realized that owing to the negligence of the defendant in failing to deliver said first described telegram that it would be impossible for him to reach Benavides in time to attend the funeral of his said sister.

"Plaintiff further avers that the said Grace was his eldest sister, and that the strongest feelings of love and affection had always existed between them, and that plaintiff suffered great mental pain and disappointment at not being able to attend her burial, as he would have done had the defendant promptly delivered the message sent him by his sister Kate aforesaid."

¹¹ The defendant filed a general demurrer to the amended petition, and also six special exceptions, in which the matter of objection is presented in different forms, but are in substance: 1. That the message did not notify defendant of the relationship between plaintiff and "Grace," the person reported therein to be very low, or that there was any relationship existing between them; 2. That the damages claimed are not such as the parties are deemed to have contemplated when the contract was made, or that might have been foreseen as the probable result of a breach of the contract, and that the injury alleged is not the proximate result of the negligence alleged.

Defendant also pleaded specially that the contract entered into for sending the message contained this clause: "It is agreed between the sender of the following message and this company that said company shall not be liable for mistakes or delays in the transmission or delivery of any unrepeatable message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same." Plaintiff excepted to the special answer of defendant, because it could not by contract defeat a recovery for the negligence of its servants in not delivering the message within a reasonable time, and the said plea constituted no defense to this suit. The court sustained the plaintiff's exceptions to the answer, and overruled the defendant's demurrer and exceptions to the plaintiff's petition.

Upon trial, judgment was given for plaintiff against the defendant, from which appeal was taken, and the court of civil appeals affirmed the judgment of the district court.

The court properly sustained the plaintiff's exceptions to the defendant's special answer; such stipulation in the contract could not afford protection to the defendant against the negligence of its servants in failing to deliver the message with reasonable diligence: *Thompson on Election*, sec. 228; *Gulf etc. Ry. Co. v. Wilson*, 69 Tex. 742.

There was no error in the judgment of the court overruling the third exception of the defendant, to the effect that the terms of the message were not sufficient to notify defendant of the relationship between the plaintiff and "Grace." The terms of the message were sufficient to notify the defendant that plaintiff had a serious interest in the condition of "Grace," and if there were any reasons why it desired to know more particularly the relationship, it was its duty to make inquiry, and not the duty of the sender to communicate them in the first place: *Western Union Tel. Co. v. Adams*, 75 Tex. 531; 16 Am. St. Rep. 920; *Western Union Tel. Co. v. Moore*, 76 Tex. 66; 18 Am. St. Rep. 25.

The damages for which a telegraph company will be held liable upon failure to transmit and deliver a message with proper diligence, when the message concerns sickness or death, must be ascertained by applying the rules which govern in cases of breaches of other contracts; and, if regarded as a tort, like rules must be applied as are applicable to other torts. The ¹² leading case of *Hadley v. Baxendale*, 9 Ex. 341, laid down the general rule as to breaches of con-

tracts in this comprehensive language: "When two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered as arising naturally and according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of it."

The form of expression by which courts have applied this rule to a given state of facts has varied according to the particular facts of the case under consideration, but all of the essential elements of the rule above expressed are to be found in subsequent cases upon the subject. The general doctrine has been applied by this court in many cases, as in *De la Zerda v. Korn*, 25 Tex. Supp. 194, where it is said that where there is no element "of willful wrong or gross negligence, remuneration must be restricted to the immediate consequences of the wrongful act."

As applied to this character of case, this court expressed the general doctrine thus: "In case of tort the rule is, the wrongdoer shall be answerable for all the injurious consequences of his tortious act which, according to the usual course of events and general experience, were likely to ensue, and which, therefore, when the act was committed, he may reasonably be supposed to have foreseen and anticipated: *McAllen v. Western Union Tel. Co.*, 70 Tex. 245.

It is not necessary that the injurious result will certainly follow from the breach of contract or tortious act, but it must be such as might be anticipated as a probable consequence thereof. The party who does a wrongful act or fails to perform a contract is not liable for the act of a third person which is not the natural result of such wrongful act or breach of contract. "To maintain an action for special damages, they must appear to be the legal and natural consequences arising from the tort, and not from the wrongful act of a third person remotely induced thereby": *Crain v. Petrie*, 6 Hill, 522; 41 Am. Dec. 765; *Lowery v. Western Union Tel. Co.*, 60 N. Y. 203.

Nor will a telegraph company be held liable for results that might have been avoided by action to be taken by the party himself or some third person, unless such action is called for as a natural consequence of the information con-

tained, and the action such as in the course of events would naturally follow upon the information given by the message: *Lowery v. Western Union Tel. Co.*, 60 N. Y. 203; *Smith v. Western Union Tel. Co.*, 83 Ky. 57; 4 Am. St. Rep. 126.

The language of the message was sufficient to notify the telegraph company that "Grace" was related to the plaintiff, and of the consequences to plaintiff of a failure to deliver it. The conclusion to be drawn was, ¹⁸ that there was a near relationship between the person mentioned in the message and the person addressed, and that upon its receipt he would set out to attend her in her sickness: *Western Union Tel. Co. v. Moore*, 76 Tex. 68; 18 Am. St. Rep. 25. And it also notified the defendant company that the person mentioned might die, and that plaintiff might by a failure to deliver the message be deprived of being present at her funeral. The message called for an answer as to whether or not plaintiff could come. It might on the same principles be held that from this the telegraph company would be required to take notice that he would probably answer that he could come.

Looking at the message from the standpoint of the company, could it be understood that "Grace," who was then living, would die before the message was delivered, and that upon receipt of the answer that plaintiff was on the way, the husband of "Grace," who was not known to the defendant, so far as the petition shows, would postpone the funeral until the arrival of the plaintiff? The postponement depended upon the death of the sister before arrival of plaintiff, which was uncertain; upon the answer that he would come, which depended upon his own will and his surroundings; upon the conditions surrounding the parties and the condition of the body and the weather, which were alike unknown and uncertain; and lastly upon the determination of the husband, who was unknown, and the result of whose conclusions upon the subject were not indicated in the language of the message itself.

Before the first message, the one sued upon, was delivered to plaintiff, another was delivered to its agent at the same office, announcing the death of Grace. This could not affect the liability under the first. If it be granted that the company was affected with notice of the death before delivery of the first message by the delivery to its agent of the second, it appears from the petition that if the message had been delivered in due time plaintiff could not have arrived there

in time for the funeral, which occurred on the next day, and there was nothing in the second message, so far as shown, suggesting a postponement of the funeral until his arrival.

In any event the damages claimed are not the proximate result of the failure to deliver the message, and are therefore too remote to constitute a cause of action under the well-settled principles of the law.

In *Western Union Tel. Co. v. Sheffield*, 71 Tex. 570, 10 Am. St. Rep. 790, information was conveyed and action suggested by the party addressed; the action suggested was such as in the course of business a prudent man would take, and the probable result of a failure to deliver the telegram was that the debt might be lost.

In *Parks v. Alta California Tel. Co.*, 13 Cal. 422, 78 Am. Dec. 589, information was given to an agent upon which to act, and instruction given as to the action desired. The probable result was that a failure to deliver the message¹⁴ would be that the attachment would not be sued out, and the debt thereby be lost.

In both of these cases the persons who were to perform the acts and the thing to be done were plainly indicated. It would reasonably appear to any prudent man that a man addressed thus would promptly look after his debt, and that an agent thus informed and instructed would obey the instructions.

The district court erred in not sustaining the demurrer and exceptions, either of which were sufficient; and the court of civil appeals erred in not reversing the judgment of the district court because of that error.

The conclusion at which we have arrived upon the exceptions and demurrer to the petition of plaintiff renders it unnecessary to consider the other assignments of error in this case.

From the allegations in plaintiff's petition and the evidence in the case, it is evident that the plaintiff cannot so amend his petition as to state a good cause of action, and it becomes the duty of this court to enter such judgment as the district court should have entered. It is therefore ordered that the judgments of the district court and the court of civil appeals be reversed, and that the plaintiff's petition be dismissed, and that the plaintiff in error recover of the defendant in error all costs in this case in all the courts.

THE decision in the principal case was followed in *Western Union Tel. Co. v. Molley*, 87 Tex. 38, in which it was again held that mental suffering arising from not being able to attend a funeral is not a proximate result of a delay in delivering a telegram announcing the illness and probable death of the person named therein, where, had the telegram been delivered in time, it would have been necessary for the addressee to have telegraphed and asked a postponement of the funeral to enable him to be present.

TELEGRAPH COMPANIES—POWER TO LIMIT LIABILITY FOR NEGLIGENCE OF SERVANTS.—A telegraph company may stipulate against liability for the negligence of its messengers in failing to deliver for transmission messages intrusted to them by the patrons of the company: *Stamey v. Western Union Tel. Co.*, 92 Ga. 613; 44 Am. St. Rep. 95. See, also, note to *Pacific Tel. Co. v. Underwood*, 40 Am. St. Rep. 494.

TELEGRAPH COMPANIES—NOTICE OF RELATIONSHIP FROM FACE OF MESSAGE.—A telegraph corporation is not chargeable with notice that the wife of a person to whom a message is addressed is related to a person whose death is announced therein, when the company had no knowledge of the existence of the wife nor of her relationship to the decedent: *Western Union Tel. Co. v. Carter*, 85 Tex. 580; 34 Am. St. Rep. 826, and note, with the cases collected.

TELEGRAPH COMPANIES.—THE DAMAGES which may be recovered for error in the transmission of a telegraph message or for delay in the delivery of the same are fully discussed in the cases collected in the notes to *Hughes v. Western Union Tel. Co.*, 41 Am. St. Rep. 783, and *Western Union Tel. Co. v. Fellner*, 41 Am. St. Rep. 85.

STONE v. SLEDGE.

[87 TEXAS, 42.]

CONVEYANCE.—THE SIGNING OF A CONVEYANCE BY ONE NOT DESCRIBED THEREIN as a grantor is wholly inoperative. At most it manifests the consent of such signer that another party described in the conveyance as a grantor may execute it.

IN A CONVEYANCE BY A MARRIED WOMAN OF HER SEPARATE ESTATE SHE MUST BE DESCRIBED AS THE GRANTOR.—Her signing and acknowledging such instrument with her husband when he alone is described therein as grantor does not affect her title.

CONVEYANCES.—A CERTIFICATE OF ACKNOWLEDGMENT DEFECTIVE IN FORM MAY BE AMENDED by the officer so as to make it conform to the facts.

ESTOPPEL—MARRIED WOMAN.—If a husband executes a deed which is also signed by his wife, but is void as to her because defectively executed, and the consideration of the conveyance is a transfer of other tracts of land to him, she is not, by her subsequent joinder in a conveyance to a third person of the lands so acquired by her husband, estopped from denying the validity of the original deed.

ESTOPPEL AGAINST HUSBAND AND HIS GRANTEE.—If a husband executes a conveyance with covenants of warranty of lands belonging to his wife which is void as against her because of defects in execution, he is estopped, as against innocent purchasers from his grantee, from asserting title subsequently acquired by him in the same lands by the death of his wife.

Denman & Franklin and W. O. Hutchison, for the plaintiffs in error.

L. H. Brown, Ford & Neighbors, and G. W. Jones, for the defendants in error.

52 GAINES, A. J. This action was brought by Mrs. E. A. Stone and her husband to recover a tract of land claimed to be her separate property. She died after the institution of the suit, intestate, and her two children, as her heirs, were made parties plaintiff in her stead. It was admitted that Mrs. Stone originally held title to the premises in controversy by inheritance.

The defendants asserted title through mesne conveyances under a deed executed by F. A. Stone, the husband, to J. D. Morrison on the sixth day of December, 1872. This was an ordinary warranty deed, in which the name of the husband alone appears as grantor. On the first day of March, 1873, the wife signed this conveyance, and acknowledged it before a notary public upon a privy examination. The officer appended a certificate which was materially defective and insufficient to pass the wife's title if the deed had been good in other respects.

On the twenty-ninth day of May, 1874, the notary attached to the deed another certificate of acknowledgment in full conformity to the requirements of the statutes in relation to the conveyance of property of married women; and as a part thereof he also certified that it was intended to amend his certificate previously made.

The defendants also claimed that if the alleged deed from F. A. Stone and wife to Morrison was inoperative as a conveyance of Mrs. Stone's title in the land, that she had estopped herself by her subsequent conduct from asserting that title.

The case having been submitted to a jury, the trial court instructed them, in effect, that no title was conveyed by the deed in question, but that the undisputed evidence showed that Mrs. Stone was estopped from claiming the land, and that therefore they should return a verdict for the defendants. The court of civil appeals held, upon appeal from the judgment in favor of defendants, that the trial judge was correct upon the first proposition, but that in the second he was in error.

Upon the question whether one who signs a conveyance is bound by it, although he does not appear upon its face to be

a party to the instrument, there is some conflict of opinion; but it seems to us that the great weight of authority is in favor of the proposition that as to such person the deed is wholly inoperative.

In *Agricultural Bank v. Rice*, 4 How. 225, Chief Justice Taney says: "In the premises of this instrument it is stated to be the intention of their respective husbands, in right of their wives, of the one part, and of the grantees of the other part, the husbands and the grantees being specifically named, and the parties of the first part then grant and convey to the parties of the second part. The lessors of the plaintiff are not described as grantors, and they use no words to convey their interests. It is altogether the act of the husbands, and they alone convey. Now in order to convey by grant, the party possessing the right must be the ⁵³ grantor, and use apt and proper words to convey to the grantee, and merely signing, sealing, and acknowledging an instrument in which another person is grantor is not sufficient."

The same general rule prevails in Massachusetts: *Catlin v. Ware*, 9 Mass. 218; 6 Am. Dec. 56; in Maine: *Peabody v. Hewett*, 52 Me. 33; 83 Am. Dec. 486; in Ohio: *Purcell v. Goshorn*, 17 Ohio, 105; 49 Am. Dec. 448; in Alabama: *Harrison v. Simons*, 55 Ala. 510; and in Indiana: *Cox v. Wells*, 7 Blackf. 410; 43 Am. Dec. 98.

The contrary doctrine seems to have been announced in Mississippi and New Hampshire: *Armstrong v. Stovall*, 26 Miss. 275; *Elliot v. Sleeper*, 2 N. H. 525.

We are of opinion that the rule which holds the deed inoperative is supported by the better reason, as well as by the weight of authority.

It has been said that the signing of a deed manifests the intention of the signers to be bound by it, and that the courts should construe every instrument so as to give effect to the intention of the parties to it. But the intention of the parties to a written contract must be derived from the language of the contract itself; and when there is nothing in a deed to show an understanding on part of one of the signers to convey, we do not see very clearly that his signature manifests a purpose to make a conveyance.

When the title is in one person, and the consent of another is essential under the law to convey such title, and such other signs the deed, his name not appearing therein as a

grantor, the signature, it would seem, would merely manifest his consent to the conveyance.

Such was the case of *Ochoa v. Miller*, 59 Tex. 460. There the husband signed the deed of the wife, which purported to convey her separate property, and in which he was not named as a party. He had nothing to convey, and his formal assent by joining in her conveyance was all that was required on his part to pass title to the property. It was properly held that his signature and acknowledgment to the wife's deed was sufficient to show that he had joined with the wife in the conveyance.

Such, also, were the cases of *Armstrong v. Stovall*, 26 Miss. 275, above cited, and *Stone v. Montgomery*, 35 Miss. 83, in the same court. They are very clearly distinguishable from a case like the present, where one signs a deed which purports to be wholly the act of another, and where the claim is that the property of such signer passes by the conveyance.

The wife's signature to the instrument under consideration does tend to show her consent to her husband's conveyance of the land, but that is a very different thing from manifesting a purpose to convey her own interest.

The deed in question was executed while the act of April 30, 1846, was in force, and it is insisted that the language of that act indicates that the signature of the wife, with her privy acknowledgment duly certified, was all that was required to pass her title. That act reads in part as follows: §4 "When the husband and his wife have signed and sealed any deed or other writing purporting to be a conveyance of any estate, or interest in any land, slave or slaves, or other effects, the separate property of the wife, or of the homestead of the family, if the wife appear before any judge of the supreme or district court or notary public, and, being examined by such officer apart from her husband, shall declare that she did freely and willingly sign and seal the said writing, to be then shown and explained to her, and wishes not to retract it, and shall acknowledge the said deed or writing so again shown to her to be her act, thereupon such judge or notary shall certify such privy examination, acknowledgment, and declaration under his hand and seal, by a certificate annexed to said writing, to the following effect and substance," etc. Paschal's Digest, article 1003.

Taken literally, this may be construed to mean that it is sufficient if the deed be in the name of the husband, and be

signed, sealed, and properly acknowledged both by the husband and wife. But we are of the opinion that such was not the intention of the legislature. A deed in the name of the husband alone may purport to convey property which in fact belongs to the wife in her separate right, but it purports to convey it as his own, and not as her property.

We think the instrument which was intended to be designated by the statute is a deed which upon its face purports to convey the wife's title to the property described, and that in order to make it such, it must appear from the body of the conveyance itself that the wife is a grantor therein.

Besides, the statute requires that the contents of the conveyance shall be fully explained to the wife by the officer. What explanation would be given of a deed like that under consideration? The officer is not presumed to know anything of the title to the land which the instrument purports to convey. Could he explain to her that the legal effect of her signature to and acknowledgment of the deed is to pass the title to her separate estate, unless he knew that the property belonged to her and not to her husband? It would seem he would fulfill his entire duty in that particular by explaining to the wife that the deed was a conveyance by the husband of his title to the land therein described. To permit a conveyance capable of such explanation to have the effect to convey the wife's estate in the land is calculated not only to defeat an obvious purpose of the statute, but to open a door to imposition and fraud.

For the reasons stated, we think that the deed under consideration did not convey the wife's title to the land in controversy. It is therefore unnecessary for us to determine whether the amended certificate of May 19, 1874, would have made it a valid conveyance provided she had been a grantor in the instrument.

But in order to prevent any misconception which may arise from the opinion of the court of civil appeals upon that question, we will say, ⁵⁵ that if the point were before us we are inclined to think that we should be constrained to hold, that the officer while in office had power to amend his certificate. There has been no decision in our court upon the question, but the previous intimations of the court are in favor of that view: *McKellar v. Peck*, 39 Tex. 381; *Peck v. McKellar*, 83 Tex. 234. It must, however, be conceded, as we think,

that the weight of authority elsewhere supports the opinion of the court of civil appeals.

Since, as we conclude, the deed under which defendants claim cannot be construed either as a conveyance of the land in controversy by Mrs. Stone or as an attempt by her to convey it, it follows, as we think, that her rights in the land were in no manner affected by her joining her husband in conveying the property conveyed to him by Morrison.

The deed to the Round Rock property was dated December 6, 1872. The consideration of that conveyance was expressed to be twelve hundred and fifty dollars and three hundred and ninety-five acres of land lying in Hays county (the land in controversy), and seven hundred and thirty-five acres of land in Blanco county, "to be hereafter conveyed by said Stone with good and valid legal title with warranty unto me and my heirs," etc.

We have seen that the deed to the land in Hays county was dated as of the same day as the deed from Morrison and wife and Stone to the Round Rock property. It was, however, not acknowledged by F. A. Stone until January 13, 1893.

But the conveyance from Morrison and wife would indicate that Stone's contract, in so far as it conveyed the property in controversy, was to be fully performed whenever he should execute and deliver to Morrison his own deed to the land, with the usual covenants of warranty. The deed which was actually executed and accepted amounted to this, and to nothing more.

Mrs. Stone's title to the property in controversy constituted no part of the consideration for the property conveyed by Morrison and wife to her husband; it was Stone's warranty deed to the land that constituted in part that consideration.

The lots in Round Rock therefore became community property; and being at the time the homestead of Stone and wife, her joinder in her husband's deed by which they were conveyed did not in any respect affect her title to the land in controversy in this suit. The consideration for the conveyance of the Round Rock property did not enure to the benefit of her separate estate; and, having received nothing, she was not bound to return the consideration for the land conveyed by her husband to Morrison, as a condition precedent to its recovery by her. We find no element of estoppel in the transaction, so far as Mrs. Stone is concerned.

Since it appears that Morrison in his deed to Stone to the

property in Round Rock warranted the title, and that Stone was compelled to discharge a lien then existing upon it which amounted to more than the ⁵⁶ consideration of the land in controversy as expressed in his deed to Morrison, we are of opinion, that as between the original parties Stone would not be estopped to claim the third-interest for life in the land which descended to him upon the death of his wife. But as to persons claiming under Stone as innocent purchasers, we think the estoppel would apply. The covenant of warranty runs with the land (*Flaniken v. Neal*, 67 Tex. 629), and any person purchasing the land and paying value, without notice of the facts which would render it inoperative, would be entitled to claim every right arising under it, as if no such facts existed.

The judgment of the district court is reversed and the cause remanded.

Associate Justice BROWN did not sit in this case.

CONVEYANCES—DESCRIBING GRANTOR.—Where one signs, seals, and delivers an instrument supposed to be a perfect deed, but his name appears in no other part thereof, his interest in the premises described in such instrument is not thereby conveyed: *Peabody v. Hewett*, 52 Me. 33; 83 Am. Dec. 486. This question is fully discussed in the extended note to *Payne v. Parker*, 25 Am. Dec. 226.

HUSBAND AND WIFE—CONVEYANCES BY.—A wife joining with her husband in the execution of a deed does not convey her interest in the premises granted. To have such an effect her name must be inserted in the body of the instrument: *Cox v. Wells*, 7 Blackf. 410; 43 Am. Dec. 98, and note; *Purcell v. Goshorn*, 17 Ohio, 105; 49 Am. Dec. 448; *Catlin v. Ware*, 9 Mass. 218; 6 Am. Dec. 56, and note. See, also, the note to *Sharp v. Bailey*, 81 Am. Dec. 492.

DEED OF MARRIED WOMAN—DEFECTIVE ACKNOWLEDGMENT.—Where a married woman's deed is void because defectively acknowledged, and she conveys to a second purchaser after her husband's death, the latter's title is perfect: *Central Land Co. v. Laidley*, 32 W. Va. 134; 25 Am. St. Rep. 797, and note. See, also, the extended note to *Kantrowitz v. Pruther*, 99 Am. Dec. 604.

ACKNOWLEDGMENT—CORRECTION OF.—Officers taking acknowledgments to deeds have the right to and may be compelled at any time to correct errors in their certificates: *Westhafer v. Patterson*, 120 Ind. 459; 16 Am. St. Rep. 330, and note. This question is fully discussed in the extended note to *Jordan v. Corey*, 52 Am. Dec. 520, and *Griffith v. Ventress*, 24 Am. St. Rep. 926.

RICE v. ST. LOUIS, ARKANSAS & TEXAS RY. CO.

[87 TEXAS, 90.]

EJECTMENT—COMMON SOURCE OF TITLE.—If a plaintiff proves in an action to recover possession of real property that he and the defendant claim under a common source of title, and that of the two titles emanating from that source the plaintiff's is the superior, he has established prima facie a right to recover which is not rebutted or overthrown by evidence of title in a third person prior to the conveyance to the common grantor, unless it further affirmatively appears that the title of the third person has never become vested in such common grantor.

W. O. Davis, J. L. Harris, and Duffie & Duffie, for the plaintiff in error.

Sam H. West, and Clark, Dyer & Bolinger, for the defendant in error.

92 GAINES, A. J. The plaintiff in error brought this suit to recover of defendants in error the tract of land in controversy. All the defendants pleaded not guilty, and some of them the statute of limitations. The heirs of one Lafayette Cleveland, under whom both plaintiff and defendants claim, intervened, asserting their ownership in the land.

Upon the trial, which was without a jury, the plaintiff introduced in evidence a copy of a judgment of the district court of Coryell county, rendered October 2, 1880, setting apart to Lafayette Cleveland the land in controversy, "in a cause in which said Cleveland and his two brothers were sole parties"; and proved that Lafayette Cleveland died in December, 1878, intestate, leaving surviving him his widow, Ava Cleveland, and his sons, Henry Cleveland, Daniel Cleveland, J. R. Cleveland, Lafayette Cleveland, Jr., and his daughters, S. C. Campbell, wife of R. W. Campbell; M. C. Russell, wife of D. C. Russell; and Emma Cleveland, who subsequently married John A. Russell. The plaintiff also introduced in evidence deeds to himself dated February 2, 1889, from the widow and all the above-named heirs of Lafayette Cleveland, except Lafayette Cleveland, Jr.; and for the purpose of showing the common source of title he introduced further a power of attorney from Lafayette Cleveland to Wharton Branch, empowering the latter to convey the land, dated August 12, 1876, together with deeds executed by Branch as such attorney in the year 1882, conveying the lands to defendants or to those under whom they claim.

The defendants then introduced in evidence the patent from the state, issued in 1852, to Mary Hawley for the land in controversy, and a deed from Mary Hawley, dated January 15, 1859, to one John Morgan, to the same land. The defendants there rested, except as to the issues of the statute of limitations and improvements in good faith. The intervenors, it seems, offered no evidence.

The trial court held that neither the plaintiff nor the intervenors were entitled to recover, and gave judgment for the defendants. The court of civil appeals affirmed that judgment, basing their conclusion upon the ground that the defendants, by proving that the land had been patented to Mary Hawley, and had been by her transferred to Morgan, had shown a complete defense to the action. In this ruling we do not concur.

The rule as to the common source is, that when the plaintiff has proved that he and the defendant claim title to land from a common source, and that of the two titles emanating from that source his is the superior, he shows a prima facie right to recover; and it may be conceded that it is a rule of evidence and not of estoppel: *Howard v. Masterson*, 77 Tex. 41. ²² Notwithstanding the proof of the insufficiency of his title under the common source, the defendant may still defeat the action by showing that there is a title superior to that of the person or persons under whom both claim, and that he is the holder of that title; and, even without showing that he holds such superior title, it may be that his defense ought to prevail, provided he prove affirmatively not merely that some one had the title anterior to that of the common source, but also that such previous title never vested in the common source.

But, as we understand it, all the authorities hold that when one accepts a conveyance from another it is at least prima facie evidence, as against the grantee, of title in the grantor. It follows that if a plaintiff in an action of trespass to try title proves that he has acquired the title of such grantor—for example, that he has the only or elder valid conveyance of such title—he shows a right to recover, provided there be no sufficient evidence to rebut the presumption arising from an acceptance by the defendant of the deed of his grantor.

Does mere proof that some one held a title anterior to the time at which the grantor undertook to convey show that at

that time he had no title? Clearly not. A state of things once shown to exist is ordinarily presumed to continue, in the absence of proof to the contrary. But here the very point presents itself upon which the determination of the question under consideration must turn.

Evidence that the defendant claims title under the common grantor is prima facie proof that such grantor had the title at the time he undertook to convey the right which the defendant claims; and this necessarily involves the assumption that he had acquired the title of all previous owners. The rule as to proof of common source means this, if it means anything. The rule is statutory in this state, and to permit a defendant to defeat its operation by showing the naked fact that, previous to the time the grantor undertook to convey, some third party had the title would render it nugatory. To show that the title to the land in controversy was in some third person before the Cleveland brothers claimed it is merely to prove what we knew before, and falls far short of showing that the title was not in them when the decree of partition was rendered. In other words, proof of title in Morgan does not overcome the prima facie case made by the plaintiff when he introduced evidence showing that defendants derived their title through deeds which purported to convey the land as the property of Lafayette Cleveland.

There are eminent authorities which hold that in order to defeat a recovery, when the plaintiff has proved that both parties claim from a common source, and that his is the superior title under that source, the defendant must not only show that there is an outstanding title, but that he must connect himself with that title: *Cooke v. Avery*, 147 U. S. 375; *Cox v. Hart*, 145 U. S. 376; *Christenbury v. King*, 85 N. C. 229; ⁹⁴ *Caldwell v. Neely*, 81 N. C. 114. But it seems to us that so great a restriction of the defendant's right is not in accordance with sound principles. Since the plaintiff must prove his title in order to recover, it would seem, when he has shown title under the common source, that proof by defendant, however made, that the common grantor had no title ought to be a defense. But, as we have intimated, evidence merely of title in some one anterior to the conveyance of the common grantor does not make such proof.

The judgment will be affirmed as to defendants T. V. Hood, G. W. Coleman, and John T. Holbrook, who were found to have shown title by limitation. It being impracticable to

adjust the rights of the other defendants under the record before us, the judgment as to them is reversed and the cause remanded.

Claimants Under a Common Source of Title.

The principal case is a fair illustration both of the tendency of the courts to enforce and sustain a title derived from the common grantor of the adverse parties to the action, and at the same time of their disinclination to affirm the principle of law governing cases of this character with such distinctness as to enable us to determine whether indeed there is in any case any absolute estoppel against a party to an action precluding him from proving therein that while he and his adversary claim to be grantees of the same person, yet that such person never, in fact, had any title, and therefore that the acceptance of the deeds in question ought to be regarded as immaterial.

As a matter of evidence there is no doubt that when either of the parties to an action for the recovery of real property, or otherwise affecting the title thereto, proves that both of the parties have acquired their respective titles from a common grantor, it will be assumed *prima facie* that such grantor was the owner of the property at the time he executed the first conveyance thereof, and the grantee in such conveyance or his successors in interest must recover the property as against any person claiming under a conveyance executed after that by which the common grantor first parted with his title. In other words, neither party need go back of the first conveyance from a common grantor, and whoever shows title under such conveyance must be awarded priority, as long as there is no evidence assailing the common source of title: *Cox v. Hart*, 145 U. S. 376; *Frink v. Roe*, 70 Cal. 305; *Sellman v. Hardin*, 58 Tex. 86; *Collins v. Davidson*, 6 Tex. Civ. App. 73; *Lasater v. Van Hook*, 77 Tex. 650; *Drake v. Happ*, 92 Mich. 580; *Izlar v. Hartley*, 24 S. C. 382; *Howard v. Masterson*, 77 Tex. 41; *Carson v. Dundas*, 39 Neb. 503; *Moss v. Union Bank*, 7 Baxt. 216; *Rochell v. Benson*, Meigs, 6; *Wortham v. Cherry*, 3 Head, 469; *Lake Erie etc. R. R. Co. v. Whitham*, 155 Ill. 514; 46 Am. St. Rep. 355; *Nitche v. Earle*, 117 Ind. 270; *Merchants' Bank v. Harrison*, 39 Mo. 433; 93 Am. Dec. 285; *Bishop v. Truett*, 85 Ala. 376; *Pollard v. Cocke*, 19 Ala. 188; *Finch v. Ullman*, 105 Mo. 255; 24 Am. St. Rep. 383; *Luen v. Wilson*, 85 Ky. 503; *Blalock v. Newhill*, 78 Ga. 245; *Laidley v. Central Land Co.*, 30 W. Va. 505; *Barton v. Erickson*, 14 Neb. 164; *Roosevelt v. Hungate*, 110 Ill. 595; *Cronin v. Gore*, 38 Mich. 381; *Miller v. Hardin*, 64 Mo. 545; *Brown v. Brown*, 45 Mo. 412; *Gaines v. New Orleans*, 6 Wall. 642; *Fellows v. Wise*, 49 Mo. 350; *Butcher v. Rogers*, 60 Mo. 138; *Ives v. Sawyer*, 4 Dev. & B. 51; *Doe v. Pritchard*, 11 Smedes & M. 327; *McWhorter v. Heltzell*, 124 Ind. 129; *Low v. Settle*, 32 W. Va. 600; *Conger v. Converse*, 9 Iowa, 554; *Riddle v. Murphy*, 7 Serg. & R. 230, 235.

Estoppel.—It may happen, however, that one of the parties, while he admits that both have conveyances from the common grantor, will undertake to prove that such grantor did not, in fact, at the execution of his conveyance have any title, and therefore that those conveyances must be regarded as immaterial. If the rule to which we are referring is a mere rule of evidence, then it must be conceded that the proof that both parties have claimed from a common source of title amounts to no more than ascertaining that the burden of proof must be assumed by the party who denies

the existence of title in the common grantor, and that he is entitled to have the common grantor and his conveyances entirely disregarded upon producing satisfactory proof that he had no title to convey. If, on the other hand, the mere fact that two persons have accepted a conveyance from the grantor established such a relation between them that each is estopped from asserting as against the other the absence of title in such grantor, all evidence upon the question must be excluded and the estoppel left in full operation, and the common grantor treated as the only possible source of title. That there is no estoppel in the strict and proper sense of the term must be admitted, for either of the parties is at liberty to prove that the title of the property, instead of being vested in the common grantor, was in fact vested in a third person, provided that he who makes or offers this proof can connect himself with such third person by showing that he has acquired and is entitled to rely upon his title.

In many of the cases, however, while one of the parties may, if permitted to do so, be able to prove that a third person had title paramount to that of the common grantor, he may not be able to connect himself with it. The difficult question is, therefore, whether, in such a case, the court must proceed, in opposition to the truth, upon the assumption that the title was in the common grantor, and permit a recovery by or on behalf of his first grantee, though he manifestly acquired no title whatever by the conveyance which he received. There are, indeed, many cases asserting in general terms that where the adverse litigants are grantees of a common grantor, and neither of them has acquired the paramount outstanding title, neither can impeach the title of their common grantor: *Schwallback v. Chicago etc. Ry. Co.*, 69 Wis. 292; 2 Am. St. Rep. 740; *Doe v. Dugan*, 8 Ohio, 87; 31 Am. Dec. 432; *Gillian v. Bird*, 8 Ired. 280; 49 Am. Dec. 379, and extended note, 383; *Bedford v. Urquhart*, 8 La. 234; 28 Am. Dec. 137; *Lewis v. Watson*, 98 Ala. 479; 39 Am. St. Rep. 82; *Gaines v. New Orleans*, 6 Wall. 642; *Ames v. Beckley*, 48 Vt. 395. The reason given for this assertion is that each of them is estopped to deny the title of their grantor, unless he has, in fact, acquired the paramount title from a third person not bound by this estoppel: *Caldwell v. Neely*, 81 N. C. 114; *Mickey v. Stratton*, 5 Saw. 475; *Johnson v. Watts*, 1 Jones, 228; *Cooke v. Avery*, 147 U. S. 375; *Christenbury v. King*, 85 N. C. 229; *Doyle v. Wade*, 23 Fla. 90; 11 Am. St. Rep. 334; *Union Bank v. Manard*, 51 Mo. 548; *McCready v. Lansdale*, 58 Miss. 877; *Smith v. Lindsey*, 89 Mo. 76; *Gantt v. Cowen*, 27 Ala. 582; *Whissenhun v. Jones*, 78 N. C. 361; *Eagle etc. Co. v. Monteith*, 2 Or. 282; *McClain v. Gregg*, 2 A. K. Marsh. 454. Therefore it is not material that the evidence shows that a deed forming part of the common chain of title is imperfect or void: *Burns v. Goff*, 79 Tex. 236; *Pearson v. Flanagan*, 52 Tex. 266; *Stegall v. Huff*, 54 Tex. 193; or that for any other cause the common grantor had no title whatsoever: *McDonald v. Hannah*, 51 Fed. Rep. 73; *Horning v. Sweet*, 27 Minn. 277; *Orton v. Noonan*, 19 Wis. 356; *Butcher v. Rogers*, 60 Mo. 140; *Spect v. Gregg*, 51 Cal. 200; *Bolling v. Teel*, 76 Va. 493.

We are unable to refer to any legal principle from which the conclusion can fairly be deduced that any estoppel necessarily exists in favor of or against persons from the mere fact that they have received conveyances of the same property from the same grantor. Of course, if a person should acquire possession of property under a conveyance and should not have acquired any other title thereto, and he should be sued for the possession of

this property by another person holding under a prior conveyance from the same grantor, it may be proper to hold that the defendant cannot retain possession acquired under a title by proving that the title itself was imperfect, and that some third person, who is at present making no claim, has a better right to the possession than any of the parties to the litigation. In such a case the defendant is in a position similar to that of a tenant who, after accepting a lease and obtaining possession thereby, undertakes, without surrendering such possession, to dispute his landlord's title.

The relations between a lessor and lessee and a grantor and grantee are essentially different. The former yields possession of the property under a contract, express or implied, that it shall be restored to him at the expiration of his lease, and it would be productive of bad faith on the part of lessees to permit them after thus acquiring possession to deny the title of their lessor and to refuse to surrender possession in accordance with the covenants of the lease. A grantor of the fee, on the other hand, parts with all his estate in the property, and does not need any protection against subsequent acts of his grantee. The latter, having paid the full purchase price, owes no further duty to his grantor, and therefore is under no obligation to defend or maintain the title acquired from him. The grantee may, therefore, at any time deny that he received any title by virtue of his conveyance: *San Francisco v. Lawton*, 18 Cal. 476; 79 Am. Dec. 187; *Osterhout v. Shoemaker*, 3 Hill, 513; *Wenzel v. Schultz*, 100 Cal. 250, 255; *Watkins v. Holman*, 16 Pet. 25, 53. If, as these authorities affirm, the grantee is not estopped as against his grantor from denying that he received title from the latter, it is difficult to understand upon what principle an estoppel may arise in favor either of a prior or a subsequent grantee of a common grantor when no such estoppel existed in favor of him. We are therefore inclined to share in the views expressed in the principal case that the authorities holding that the defendant cannot defeat a recovery where he and the plaintiff claim from a common source, except by showing the acquisition of a paramount outstanding title, are unsound in principle, and that, "since the plaintiff must prove his title in order to recover, it would seem that when he has shown title under the common source, that proof by the defendant, however made, that the common grantor had no title, ought to be a defense." In the only cases necessarily affirming the right of the defendant to make this defense, however, it distinctly appeared that the common grantor had no title whatever, and in two of them that the conveyances which he made were by quitclaim, and therefore could not be regarded in themselves as an assertion on his part or an admission upon that of his grantees that he had title: *McDonald v. Hannah*, 51 Fed. Rep. 73; *Wolfe v. Doe*, 13 Smedes & M. 103; 51 Am. Dec. 147; *Henry v. Reichert*, 29 Hun, 395; *Sparrow v. Kingman*, 1 N. Y. 242. It is much to be regretted that in the decisions affirming in general terms an estoppel to exist as between grantees of a common grantor few of them have so considered the subject as to indicate that it had received careful attention.

The cases in which the questions here considered have arisen have generally been actions in ejectment or proceedings of a similar character for the recovery of the possession of real property, and hence it cannot, perhaps, be affirmed upon authority that the rules adopted are applicable to other controversies. We do not, however, observe anything in the nature or object of these actions to make a rule upon this subject conceded to be applicable

to them inapplicable to other controversies or proceedings respecting real property. The only suit of a different character in which the rule was invoked, falling within our observation, was one for partition, and in that the rule applicable in the state in actions of ejectment was applied without any discussion of the question and apparently without any suggestion upon the part of either the court or of counsel that the rule of evidence or of estoppel in the one proceeding could or ought to be different from that in the other: *Ketchum v. Schicketana*, 73 Ind. 137.

Cotenants.—The decisions which we have hitherto cited have been pronounced in cases in which the litigants deriving title from a common grantor have claimed estates in severalty. If, however, they are cotenants of the property, the rules already referred to apply to them with additional force. If either of them has acquired possession of the property under a conveyance from a common grantor or ancestor, his position is very much like that of a lessee receiving possession of property from his landlord in this, that he cannot, while he remains in possession, dispute the common title, nor deny to his cotenant any right to the possession of the property because of any defect in their common title, even though he has acquired a paramount adverse title: *Reinhart v. Bradshaw*, 19 Nev. 255; 3 Am. St. Rep. 886; Freeman on Cotenancy and Partition, sec. 152; *Jackson v. Streeter*, 5 Cow. 530; *Bornheimer v. Baldwin*, 42 Cal. 34; *Braintree v. Battles*, 6 Vt. 395; *Funk v. Newcomber*, 10 Md. 301; *Phelan v. Kelley*, 25 Wend. 391; *Olney v. Sawyer*, 54 Cal. 379. But it cannot be truly affirmed that a cotenant is absolutely estopped from denying the validity of the title of the common grantor, or from asserting in favor of himself a paramount adverse title by him acquired. The relations between cotenants are such that neither is at liberty to acquire a hostile title and to assert it against his cotenants if they on their part choose to share in the burdens of the acquisition. Every purchase of an adverse title by a cotenant is prima facie made for the common benefit, and must be regarded as held in trust for all the cotenants at their election, provided they contribute their share of the expenses of the acquisition: Freeman on Cotenancy and Partition, sec. 154; *Venable v. Beauchamp*, 3 Dana, 324; 28 Am. Dec. 74; *Weaver v. Wible*, 25 Pa. St. 270; 64 Am. Dec. 696; *Gossom v. Donaldson*, 18 B. Mon. 230; 38 Am. Dec. 723; *Barker v. Jones*, 62 N. H. 497; 13 Am. St. Rep. 586; *Donnor v. Quatermas*, 90 Ala. 164; 24 Am. St. Rep. 778; *Brittin v. Handy*, 20 Ark. 381; 73 Am. Dec. 497; *Tiedale v. Tiedale*, 2 Sneed, 596; 64 Am. Dec. 775; *Lloyd v. Lynch*, 28 Pa. St. 419; 70 Am. Dec. 137. If, after having a reasonable opportunity to make this contribution, they neglect or refuse to do so, the party acquiring the adverse title is not estopped from asserting it in any appropriate proceeding, and may therefore recover possession from his cotenants to the extent of any paramount title so acquired by him: *Titsworth v. Stout*, 49 Ill. 78; 95 Am. Dec. 577; *Brittin v. Handy*, 20 Ark. 381; 73 Am. Dec. 497; Freeman on Cotenancy and Partition, sec. 156. "As the rule forbidding the acquisition of adverse titles by a cotenant from being asserted against his companions is always said to be based upon considerations of mutual trust and confidence supposed to be existing between the parties, the question naturally arises whether the rule is applicable where the reasons on which it is based are absent. Joint tenants, tenants by entirety, and coparceners always hold by and under the same title. Their union of interest and of title is so complete that, beyond all doubt, such a relation of trust and confidence unavoidably results therefrom that neither will be permitted to act in hostility to the interests of the other in reference to the joint estate.

Tenants in common, on the other hand, may claim under separate conveyances, and through different grantors. Their only unity is that of right to the possession of the common subject of ownership. As their connection is not necessarily so intimate as that of other cotenants, it may well be doubted whether they should always be subject to the restraints imposed upon the others. There are many cases in which the rule in regard to the acquisition of an adverse title by a cotenant is spoken of in general terms as applying to tenants in common, irrespective of their special and actual relations to one another. But an examination of the decisions clearly shows that tenants in common are not necessarily prohibited from asserting an adverse title. If their interests accrue at different times, and under different instruments, and neither has superior means of information respecting the state of the title, then either, unless he employs his cotenancy to secure an advantage, may acquire and assert a superior outstanding title, especially where the cotenants are not in joint possession of the premises: *Roberts v. Thorn*, 25 Tex. 736; 73 Am. Dec. 552; *Frents v. Klotsch*, 28 Wis. 317; *Wright v. Sperry*, 21 Wis. 336; *Brittin v. Handy*, 20 Ark. 381; 73 Am. Dec. 497; *Matthews v. Bliss*, 22 Pick. 48; *Rippetoe v. Dwyer*, 49 Tex. 498; *King v. Rowan*, 10 Heisk. 682. Contra, *Bracken v. Cooper*, 80 Ill. 229; *Montague v. Selb*, 106 Ill. 49."

FREEMAN v. McANINCH.

[57 TEXAS, 182.]

RES JUDICATA, EVIDENCE TO DISPROVE.—Where it appears from the record of a cause that a question has been presented and decided, extrinsic evidence is not admissible to limit the effect of the record by proving that the parties on the trial of the former action limited their controversy to certain specific property less than that which the record shows to have been in issue between them. Hence, where the record shows an action to recover the possession of land, and a verdict and judgment in favor of the plaintiff for the whole, parol evidence is not admissible to prove that the only question litigated was one of boundary, and that the title to a part of the tract recovered was not submitted for decision nor decided.

RES JUDICATA—A PARTY CANNOT RELITIGATE MATTERS WHICH HE MIGHT HAVE INTERPOSED.—If he fails to plead or prove a fact which he might have pleaded or proved, or makes any other mistake during the progress of the action, this, while the judgment remains in force, cannot limit its effect.

Peeler & Peeler, for the plaintiff in error.

W. S. Holman, for the defendants in error.

133 STAYTON, C. J. On December 7, 1878, John D. Freeman brought an action against J. F. McAninch and Daniel McCray to recover a tract of land containing six hundred and twenty-two and one-half acres, part of one-third of a league of land originally granted to Joseph Washington.

The petition was in the usual form of petitions in actions of trespass to try title, and described the land sued for by metes and bounds.

Defendants demurred to the petition, pleaded not guilty, limitation of three and ten years, and set up title in themselves to part of the land, giving description of that which each claimed, under a survey made by virtue of certificate issued to George Allen. They also pleaded in estoppel acts of D. C. Freeman, and claimed value of improvements made in good faith. The cause was tried before a jury, and upon a verdict for plaintiff judgment was rendered in his favor for all the land sued for, which in the judgment was described as in the petition. ¹⁸⁴ From that judgment defendants prosecuted a writ of error to the supreme court, where the judgment was affirmed.

Defendants in that action seek in this to avoid the effect of that judgment as an adjudication of the title to all the land described in the petition and judgment; and Daniel McCray now asserts title to one hundred and thirty-four and one-third acres of the land embraced in that judgment, to which he asserts title through a conveyance made by D. C. Freeman pending that action.

In the view taken of the case it is not necessary to inquire whether D. C. Freeman had power under the will of the mother of John D. Freeman to convey to McCray, nor whether he assumed to convey his interest in the particular tract. On the trial in the district court evidence was admitted for the purpose of avoiding the effect of the former judgment, and on appeal it was held by the court of civil appeals that such evidence was admissible, one judge dissenting.

The pleadings and judgments in the former action were offered in evidence, and it was shown that the court instructed the jury that plaintiff had shown title to the Washington survey and defendants to the Allen, and that the question for their decision was, whether the land sued for was within the boundaries of the former, in which event they were informed that plaintiff was entitled to a verdict, but that otherwise the verdict should be for the defendants.

Over objection of plaintiff in error the court permitted one of the attorneys for defendants in the former action to state that "he was present and conducted the trial of said cause on the part of said defendants; that after introducing what evidence was introduced in said cause for defendants, and

before the argument of said cause, he spoke to D. C. Freeman, the father of John D. Freeman, who was present in court and representing said John D. Freeman, and made an agreement with said D. C. Freeman and the attorneys of John D. Freeman who were conducting the trial of said cause on the part of John D. Freeman, in open court, and in the presence of the court, to the effect 'that the only question involved in the cause was one of boundary between the Washington and Allen surveys.' He does not remember that the attention of the court was called to the agreement or not. That on account of the agreement he did not introduce Daniel McCray's chain of title to said one hundred and thirty-four and one-third acres tract of land, which he had with him at the trial."

An attorney representing John D. Freeman in that cause corroborated that statement, and testified: "That before the argument began in said cause the attorneys for both parties agreed in open court that the only question at issue was as to whether the George Allen one hundred and ninety-eight acres survey was included within the boundaries of the Joseph Washington one-third league survey. That he remembers that there was no land in controversy ¹³⁵ in said suit except said one hundred and ninety-eight acres, and that the whole controversy was in regard to same."

To verify his statement he referred to his brief filed in said cause, in which he said the following statement was made: "It was admitted that defendant in error [John D. Freeman] was the owner of the said Washington survey, and that the plaintiffs in error were the owners of the title to the George Allen survey, and the question at issue was whether the said Allen was included in the boundaries of the said Washington survey."

McCray was permitted to state that he was present at the trial of the former action, and that "the title to the one hundred and thirty-four and one-third acres tract was not involved in said suit, and his title papers to the same were not read in evidence."

This cause was tried by a jury, and, in reference to the former judgment, the court instructed them as follows: "Second question for you to answer is, whether or not in the case decided in 1883 of *J. D. Freeman v. McCray and McAninch*, number 1311, the title to the one hundred and thirty-four and one-third acres now claimed by McCray out of the Joseph

Washington survey was involved as an issue; or was or was not the boundaries between the Washington and Allen surveys the only issue decided in said case." The jury found that the only issue in the former action "was the boundary line between the Allen and Washington surveys."

The court refused to instruct that "the effect of the petition of the plaintiff, John D. Freeman, in the said original suit, and the said answer of the defendants therein, was to put in issue in said suit the title and right of possession to all the land described in the petition of plaintiffs in said original suit."

Where it appears from the record of a court having jurisdiction over the parties and subject matter that an issue has been presented and decided, then the decision so made, so long as it is not set aside in some lawful manner, must be held conclusive upon the rights of the parties when the same issue is again presented; and in such cases extrinsic evidence cannot be received to contradict the record, by showing that an issue necessarily involved in the cause was not presented and decided. If the record leaves that matter uncertain, then extrinsic evidence may be resorted to for the purpose of showing what was actually decided. That the court in which the former action was tried had jurisdiction over the parties to and subject matter involved in that controversy cannot be questioned.

What was the issue involved in that cause as shown by the record? An issue is the question in dispute between parties to an action, and in the courts of this state that is required to be presented by proper pleadings. The record of the former action shows that plaintiff in his pleadings alleged that he was the owner of a tract of land therein particularly described; ¹³⁶ that defendants, without right, had taken possession of that, and that he was entitled to have it restored to him. It is conceded that the tract of one hundred and thirty-four and one-third acres now in controversy is a part of the land so claimed. It shows that the defendants denied plaintiff's ownership, and controverted his right to possession; and, to intensify this denial, asserted right in themselves, and stated the manner in which it was claimed that this accrued.

Thus were the issues presented, and the leading issue was one of title; and the fact that a determination of that may have depended on a question of boundary could not change the character of the vital issue in the case; for that was but

a question of fact, to be considered like any other fact in determining whether the issue of title to the land should be decided in favor of the one party or the other.

What the issues made by the pleadings were is not left uncertain by the record. The record of the former action shows that the court instructed the jury that the controversy between the parties was one of title to the land described in plaintiff's pleadings; that he had shown title to the Washington survey, and defendants had shown title to the Allen survey, after which they were instructed to determine whether the land described in plaintiff's petition was a part of the Washington survey, and, in the event they so found, they were instructed to find for the plaintiff.

The court decided the question of title to the respective surveys; and only submitted to the jury the question of boundary, on which title to the land then in controversy depended; but this did not eliminate the question of title to the land sued for.

Questions of boundary are never the subjects of litigation within themselves, but so become only where some right or title is thought to depend on their determination; and the fact that the court submitted only that question to the jury does not leave uncertain the issue actually tried and determined in the former action, even if the charge be considered without reference to other parts of the record.

The judgment was: "It is therefore considered by the court that the plaintiff, John D. Freeman, recover of the defendants, J. F. McAninch and Daniel McCray, the premises described and bounded as follows." It describes the land as described in the petition, and then declares that for this "he may have his writ of possession and his costs in this behalf expended, for which he may have his execution."

In petition for writ of error defendants alleged that plaintiff had "recovered of and from the said defendants the certain tract of land sued for." That judgment, in the light of the entire record, was an unequivocal judicial determination that the title to the land described in it was in the ¹³⁷ plaintiff, and that he was entitled to its possession, and the evidence offered to prove that such was not the issue presented and determined ought to have been excluded.

There is no decision in this state, nor elsewhere, so far as is known, which sanctions the admission of such testimony in the face of such a record. The case of *Foster v. Wells*, 4

Tex. 101, was one in which the judgment of a justice of the peace came in question, and, his record not showing what was adjudicated, it was held that this might be shown by extrinsic evidence; but in that case the general proposition was announced: "That the judgment or decree of a court possessing competent jurisdiction shall be final as to the matters determined cannot be controverted. The principle, however, extends further; it is not only final as to the matters actually determined, but as to any other matter which the parties might litigate in the cause, and which they might have had decided: *Le Guen v. Gouverneur*, 1 Johns. Cas. 436; 1 Am. Dec. 121; *Fischli v. Fischli*, 1 Blackf. 360; 12 Am. Dec. 251. But it is only when the trial was on the merits, where all the matters between the parties were or could have been adjudicated, that the judgment is a bar to another action." This, with its well recognized limitations, has been recognized as the law in this state from the earliest times.

After asserting the same rule in another case, it was said: "Such being the effect of the former judgment, . . . no evidence could have been received to impeach the judgment when the record of it was offered. It might have been competent to receive evidence to support its identity. But if the record did not show, when compared with the matters put in controversy in the suit in which it was offered, that it embraced the same subject matter, it could have offered no bar on the plea of *nul tiel record*": *Weatherd v. Mays*, 4 Tex. 390.

In the same case it is aptly said: "Our system is happily well adapted to show conclusively by the record whether it was sought to litigate a matter that had already been adjudicated. The cause of action is required fully to be set out in the petition, and the defense in the answer, that there would be no uncertainty as to the matter litigated in the adjudged case, or whether it was decided on its merits, and as little as to what was sought to be litigated in the suit pending."

"The plaintiff's title was put directly in issue by the defendant's answer in the former suit. It was the material and traversable matter in issue between these parties in that suit; and the judgment upon it is conclusive of that question in this suit: 1 Greenleaf on Evidence, 528, et seq. It is not the less so because the defendant failed to produce any evidence of title on his part. Otherwise a party might avoid being concluded by the judgment in any case by withholding his evidence. The record of the judgment conclusively estab-

lishes that the title was in issue; and it was not competent for the defendant to impeach and contradict it by the production ¹²⁸ of parol evidence": *Fisk v. Miller*, 20 Tex. 579; *Roberts v. Johnson*, 48 Tex. 137; *Graves v. White*, 13 Tex. 123; *Oldham v. McIver*, 49 Tex. 572; *Nichols v. Dibrell*, 61 Tex. 541; *Flippen v. Dixon*, 83 Tex. 421; 29 Am. St. Rep. 653; *Lee v. Kingsbury*, 13 Tex. 70; 62 Am. Dec. 546; *Tadlock v. Eccles*, 20 Tex. 792; 73 Am. Dec. 213; *McGrady v. Monks*, 1 Tex. Civ. App. 613; *Armstrong v. St. Louis*, 69 Mo. 310; 33 Am. Rep. 499; *Long v. Webb*, 24 Minn. 380, 383; *Bailey v. Williams*, 6 Or. 72; *Sturtevant v. Randall*, 53 Me. 153; *Butler v. Suffolk Glass Co.*, 126 Mass. 512; *Campbell v. Butts*, 3 N. Y. 174; *Jones v. Perkins*, 54 Me. 396; Freeman on Judgments, 275, 300; Black on Judgments, 625; Vanfleet on Collateral Attack, 526; Wharton on Evidence, 785; Smith's Leading Cases, 8th Am. ed., 915, et seq. The cases of *Cook v. Burnley*, 45 Tex. 115; *Horton v. Hamilton*, 20 Tex. 611, and *Pishaway v. Runnels*, 71 Tex. 352, do not hold to the contrary.

In *Russell v. Place*, 94 U. S. 608, the same rule is recognized; but in that case it did not appear from the record on what issue the cause was tried, and it was held that "to apply the judgment, and to give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible."

That suit was brought for infringement of a patent in certain respects, and in bar of that action a former judgment on a similar charge was pleaded; but it did not appear from the record in the former cause whether the infringement on account of which a recovery was had was the same as that on which the pending suit was based.

The case of *Hickerson v. City of Mexico*, 58 Mo. 61, seems to have presented a similar question, but there is no intimation in the opinion that parol evidence could be received to contradict the record; and the same may be said of the opinion in *Cunningham v. Foster*, 49 Me. 68.

To hold that an issue as to boundary alone was tried, and that no issue of title was presented and determined, would be to deny to the record its only legitimate construction; to attribute to the parties intention to have an issue of fact decided from which no benefit whatever could result to either party; and, worse still, to assume that the court did and intended to enter a judgment which could have no effect; for if the issue of title to the property was not determined or

intended to be, it was wholly unimportant where the boundary between the surveys was:

The issue presented by the pleadings and determined by the judgment was one of title; and that, under the agreement of the parties or determination of the court of the effect of written muniments of title offered by the respective parties, this depended on the fact of true locality of the boundary between the surveys could not change the character of that issue.

The effect of the agreement proved was that the right of the plaintiff to recover should depend on the question whether the land described in his petition was a part of the Washington survey; but this did not change ¹³⁹ the issue made by the pleadings, nor divest the judgment of its effect as a determination of title, any more than would it had the parties agreed that judgment should be entered for the plaintiff if some muniment of title offered by him was found to be genuine, and that it should be for defendant if that was found to be a forgery.

It is not claimed that any agreement was made that judgment should not be entered for plaintiff for the one hundred and thirty four and one-third acres now claimed by McCray, if the land described in the petition was found to be a part of the Washington survey, but that in that event he should have judgment for all the land but that now claimed by McCray. Under such an agreement another and very different question might arise.

Pending the former action McCray may have acquired title to so much of the Washington survey as he now claims; but if so, it was his right to assert that when the cause was tried, and his failure to do so does not now entitle him to relief he might then by diligence and care have secured.

"A party can not relitigate matters which he might have interposed, but failed to do, in a prior action between the same parties or their privies, in reference to the same subject matter. And if one of the parties failed to introduce matters for the consideration of the court that he might have done, he will be presumed to have waived his right to do so. *Hackworth v. Zollars*, 30 Iowa, 433; *Hites v. Irvine*, 13 Ohio St. 288; *Le Guen v. Gouverneur*, 1 Johns. Cas. 436; 1 Am. Dec. 21; *Gray v. Dougherty*, 25 Cal. 266.

"If a party fails to plead a fact he might have pleaded, or makes a mistake in the progress of an action, or fails to

prove a fact he might have proved, the law can afford him no relief. When a party passes by his opportunity the law will not aid him.

"In *Ewing v. McNairy*, 20 Ohio St. 322, the judge says: 'By refusing to relieve parties against the consequences of their own neglect, it seeks to make them vigilant and careful. On any other principle there would be no end to an action, and there would be an end to all vigilance and care in its preparation and trial. The same principle is well settled in numerous authorities. See *Embury v. Conner*, 3 N. Y. 511; 53 Am. Dec. 325; *Pierce v. Kneeland*, 9 Wis. 23; *Birchhead v. Brown*, 5 San. 135': *Covington etc. Bridge Co. v. Sargent*, 27 Ohio St. 237.

This is necessarily the law in all cases in which failure to use proper diligence is not caused by accident, excusable mistake, or fraud of the adverse party: *Bassett v. Connecticut River R. R. Co.*, 150 Mass. 178, 180.

The judgment of the court of civil appeals and the judgment of the district court will be reversed and the cause remanded for further trial.

JUDGMENTS—EVIDENCE THAT A MATTER IS NOT RES JUDICATA.—This question is fully discussed in the extended note to *Fahy v. Hesterley Machine Co.*, 44 Am. St. Rep. 569.

JUDGMENTS—RES JUDICATA — FAILURE TO SET UP DEFENSE.—Where a party has an opportunity to set up a defense, and neglects to do so, a judgment recovered against him will be binding. *Morrill v. Morrill*, 20 Or. 96; 23 Am. St. Rep. 95, and extended note. See also the note to *Hentig v. Redden*, 26 Am. St. Rep. 96.

SAN ANTONIO & ARANSAS PASS RAILWAY COMPANY v. LONG.

[87 TEXAS, 148.]

PLEADING.—A COMPLAINT IN AN ACTION TO RECOVER FOR THE DEATH OF THE PLAINTIFFS' MOTHER, alleging that she, during her lifetime, aided in their support and cared for them in their sickness, and that her home was their home, and that they had every reasonable expectation that had she lived she would have continued to aid and assist in their support and maintenance, and that by her death they have been deprived of her motherly care, assistance, support, and maintenance, to their damage in a sum specified, is not subject to objection on the ground that it is vague and indefinite.

DEATH OF PARENT—DAMAGES.—In an action to recover for the death of a parent it is proper to receive evidence showing the extent to which she aided and contributed to the support of her children, plaintiffs in the

action, and that she was of simple tastes and habits, and always ready to aid them with her means whenever they needed it; and further, that she had an income from the rents of property and from interest on loans, which she devoted to their support as well as to that of herself.

EVIDENCE.—THE OPINION OF A WITNESS as to whether the children of a decedent had an expectation that she would have continued to aid them had she lived, is inadmissible. The witness should be restricted to a statement of the facts, and the jury left to draw their own conclusion therefrom.

DEATH OF PARENT, EVIDENCE TO RESTRICT DAMAGES.—In an action to recover for damages to the children of a decedent from her death, evidence is admissible, for the purpose of restricting the damages, to show that by such death they have received by devise or descent property from the estate of the decedent. Especially is this true when the only pecuniary benefit which the plaintiffs could anticipate from the continued life of the decedent was aid from her out of the income of the same property to which, on her death, they succeeded by devise or descent.

DEATH OF PARENT.—THE DAMAGES RECOVERABLE for the death of a parent are not restricted to such pecuniary benefit as might have resulted to the plaintiffs from the mental or bodily labor of the decedent, if it appears that she had property or income which she devoted wholly or partly to their aid.

DEATH OF PARENT—EVIDENCE OF DAMAGES.—Plaintiffs, adult children of the decedent, seeking to recover damages for her death, must prove with a reasonable degree of certainty the data from which their compensation is to be assessed, when it is practicable to do so. If they are adults and their claim to damages is based upon assistance in the way of money and other property received in the lifetime of the decedent, and the continued reception of which they had a right to expect had her life not been taken, the failure to testify specifically to facts ought to be deemed circumstances against them warranting the setting aside of a verdict, provided it is apparently excessive.

Upson & Bergstrom and Houston Bros., for the plaintiff in error.

Denman & Franklin, for the defendants in error.

¹⁵¹ GAINES, J. The plaintiffs in the trial court, the defendants in error in this court, are the sons and daughters of Mrs. M. C. Long. They brought this suit under the statute to recover damages for injuries resulting to them from the death of their mother, which was alleged ¹⁵² to have been caused by the negligence of the defendant, the San Antonio and Aransas Pass Railway Company. The petition alleged that the youngest of plaintiffs was twenty-four years old on the day of the accident which resulted in Mrs. Long's death.

The allegations of the petition, with reference to the damages, were as follows: "Plaintiffs aver that said M. C. Long during her lifetime aided in the support and maintenance of

each one of plaintiffs, cared for them in time of sickness and at other times, and that her house was their home whenever they desired to make it such, and that each had every reasonable expectation that if M. C. Long had lived she would have continued to aid and assist in the support and maintenance of each of them, as aforesaid; and they aver that by her death each of them has been deprived of her motherly care and assistance and her said support and maintenance, all in their damage in the sum of \$15,000."

These allegations were specially excepted to, substantially upon the ground that they were vague and indefinite. The court overruled the exceptions, and we think there was no error in that ruling. It is contended that the petition should have averred specially the nature of the aid extended by Mrs. Long in her lifetime to each of the plaintiffs. The fact that the deceased during her life contributed to support of her children is evidence to be considered by the jury in determining the pecuniary loss sustained by them by reason of her death; and it may be that, in a case like this, in which the children are all adults and no longer abide under the parental roof, some evidence of a like character or effect is necessary in order to justify a recovery of damages. Such facts are not in themselves substantive facts which justify a judgment, and, being mere matters of evidence, are not required to be pleaded either in detail or with any great degree of particularity.

The following answer of Fanny Long, one of plaintiffs, was permitted to be read from her deposition, over the objection of the defendant: "Said M. C. Long did aid in the support of all her said children; her house was a home for any and all of them whenever they desired to make it so. Fanny Long, Emma Long, and Edward Long lived with her, when not absent from home. She also furnished Emma Long money for her support and to pay for medicine and medical attention when needed. She also aided in the support of said Florence Bartow by remitting money to her at different times. She aided Arthur Long the same way. She also aided Edward Long with money, and also assisted him in the support of his children by giving them presents of clothes, etc. She was a woman of simple tastes and habits, and was always ready to aid her children with her means whenever they needed aid."

The answer was properly admitted. It was an issue in

the case whether or not plaintiffs had suffered any pecuniary loss from the death ¹⁵³ of their mother. The testimony tended in a general and somewhat imperfect way to support the plaintiffs' case upon that issue, and therefore it was not irrelevant. It was the defendant's right to have more specific answers upon cross-examination, and the record shows that it availed itself of this right.

We are also of opinion that there was no error in admitting the testimony of Fanny Long, to the effect that her mother had an income from the rents of property and interest on loans, and that she devoted it to the support of herself and children.

The plaintiffs were also allowed to read in evidence to the jury the following question and answer from the deposition of the same witness: "If you say that she [meaning M. C. Long] did aid in the support of her children, please state whether they had any expectations that she would continue such support during her life; if yea, state the facts, if any, upon which such expectations were based. Each of said children had the expectation that said M. C. Long would continue to aid them if she had lived. This expectation is based upon the fact that she was a kind and affectionate mother, and had aided them during her life."

So much of the question as sought to elicit the opinion of the witness, and so much of the answer as gave that opinion, should have been excluded. The case comes within neither of the well-defined exceptions to the rule that the opinion of a witness is not admissible. The witness should have been confined to a statement of the facts, and the jury should have been left to draw their own conclusion.

The only witness who testified as to the family relations of the plaintiff and the deceased, and as to the facts affecting the amount of damages, was Miss Fanny Long. In addition to the portions of her testimony which have already been set out, she deposed, in substance, that the deceased left surviving her neither father nor mother, and that the plaintiffs—two sons and four daughters—were her only children. The deceased mother, at the time of her death, had property amounting in value to eighteen thousand five hundred dollars, and the income of her property was about eighteen hundred dollars. All of this, except about two hundred and fifty dollars, which was used in her own support, she devoted to the assistance of her children. She was cross-

examined on this subject, but was unable to give either the dates or amount of any donation, nor the amount in the aggregate that any one received in any one year. One received remittances of money, the children of another were given clothing, and others occasionally lived with her at her expense. All the children were of full age at the time of their mother's death. Three of them only resided permanently with her. Such was the substance of the testimony upon the question of damages.

Such being the evidence adduced by the plaintiffs upon the question of the amount of damages, the defendant offered in evidence the will of ¹⁵⁴ Mrs. M. C. Long, duly probated, in which she devised and bequeathed all of her estate to her four daughters. To the reading of the will in evidence the plaintiffs objected, and their objection was sustained and the evidence excluded. This action of the court raises the serious question in this case; and it is one which is of first impression in this court.

In an action for injuries resulting in death, can the defendant show, for the purpose of reducing the damages, that the plaintiffs have received by devise or descent property from the estate of the deceased? If such evidence be admissible in any case of like character, it was certainly admissible in this case. The authorities are not numerous, and the expressions of the courts are in an apparent conflict upon the question.

Among the cases relied upon in support of the negative is that of *Railroad Co. v. Barron*, 5 Wall. 90. The defendants asked the court to charge the jury "that, if the persons for whose benefit this action is brought have received in consequence of the death of said Barron, and out of his estate inherited by them from him, a pecuniary benefit greater than the amount of damages which could, under any circumstances, be recovered in this action, then, as a matter of law, they have, by the death of said Barron, sustained no actual injury for which compensation can be recovered in this action." Upon error to the supreme court of the United States that court held, in effect, that the charge was properly refused.

The trial court had, however, charged the jury, among other things, as follows: "In this case the next of kin are the parties who are interested in the life of the deceased. They were interested in the further accumulations which he

might have added to his estate, and which might hereafter descend to them. The jury have the right, in estimating the pecuniary injury, to take into consideration all the circumstances attending the death of Barron; the relations between him and his next of kin, the amount of his property, the character of his business, the prospective increase in wealth likely to accrue to a man of his age with the business and means which he had. There is a possibility in the chances of business that Barron's estate might have decreased rather than increased, and this possibility the jury may consider. The jury may also take into consideration that he might have married, and his property descended in another channel. And there may be other circumstances which might affect the question of pecuniary loss, which it is difficult for the court to particularize, but which will occur to you. The intention of the statute was to give a compensation which the widow, if any, or the next of kin might sustain by the death of the party, and the jury are to determine as men of experience and observation from the proof what this loss is."

It is apparent, we think, that evidence had been admitted of property received by inheritances by the beneficiaries from the estate of the deceased, and the case cannot be considered as a decision upon the question of the admissibility of such evidence. The court do not even discuss the charges ¹⁵⁵ given and refused, but, in course of their opinion, say in a general way: "The statute in respect to this measure of damages seems to have been enacted upon the idea that, as a general fact, the personal assets of the deceased would take the direction given them by law, and hence the amount recovered is to be distributed to the wife and next of kin in proportion provided for in the distribution of personal property left by a person dying intestate. If the person injured had survived and recovered, he would have added so much to his personal estate, which the law, on his death, if intestate, would have passed to his wife and next of kin; in case of death by the injury, the equivalent is given by a suit in the name of his representative."

The suit was brought under the statute of Illinois, which made the widow and next of kin the beneficiaries of the recovery, and directed that the amount recovered should be divided among them "in the proportion provided by law in

relation to the distribution of personal property left by persons dying intestate."

The court seems to proceed, in part at least, upon the theory that the damage which the statute is intended to compensate is the loss which accrues to the widow and next of kin of the deceased as distributees of his estate, by reason of his premature death; such loss being the difference between what the deceased actually left and what he would have left had not his life been cut short by the wrong of the defendant. That difference would seem to be his probable future savings had he lived. The proportion in which the recovery is to be distributed tends to indicate that this was the leading consideration in providing the right of action; for if the loss of any individual benefits, capable of pecuniary estimation, which would probably have accrued to any beneficiary during the life of the deceased, was to be compensated, it would seem that the statute would have provided that such beneficiary should recover such compensation for himself alone.

It must, however, be conceded, that the decisions of some of the courts upon similar statutes recognize the rights of minor children at least to recover for the loss of individual pecuniary benefits which would probably have enured to them by the continuance of the life of their parent: *Tilley v. Hudson River R. R. Co.*, 24 N. Y. 471; 29 N. Y. 252; 86 Am. Dec. 297; *Terry v. Jewett*, 78 N. Y. 338.

Under the statutes of New York the recovery is for the benefit of the next of kin, and is to be then also apportioned as under the statute of descent and distribution. It is worthy of remark, that under such a statute the recovery may go to remote collateral kindred, who have no interest whatever in the life of their relative except the prospective shares they may receive as distributees of his estate upon his dying intestate. Where such is the loss to be recompensed it is no answer to the plaintiff's demand to say to him that he has not been damaged because ¹⁵⁶ he has received a pecuniary benefit from the death of the deceased. His ground of complaint is not that he has been deprived of receiving anything, but that the amount which has come to him is less than it would have been if the life of the deceased had been prolonged.

There would seem to be an important difference between statutes which give the right of action to the next of kin, as

such, and the statute of this state which undertakes to confer compensation upon the husband or wife and the children and parents of the deceased only, and which requires that the jury shall determine separately the amount to be recovered by each of the beneficiaries.

Where the right of action is given for the benefit of the next of kin, and the sum recovered is to be apportioned as under the statute of descent and distribution, it would seem that the leading purpose is to give compensation for some loss suffered by them all in common; that is to say, the damage which has accrued to them as next of kin by reason of the loss of a prospective increase in the amount of the estate to be distributed. Our statute excludes from its benefits the collateral kindred, and its leading purpose seems to be to compensate only such near relatives of the deceased as may be dependent upon him for support or other aid of pecuniary value, or such as may have been the recipients of such aid or support.

It may be that in statutes of the one class special injury to one beneficiary may be considered and compensated, though it is difficult to see why the recovery for such loss should be distributed in a fixed proportion among all. And it may be, also, that under our statute the loss of a prospective increase of inheritance may be an element of damages. But under the latter each beneficiary recovers for his own special injury. The damages must be actual and for loss of a pecuniary nature. Nothing is given by way of solace. Under such a law we cannot see how it can be maintained that one has been damaged by the death, when he has received from the estate of the deceased property exceeding in value all the prospective benefits which would have accrued to him had the death not ensued.

Let us suppose that a wealthy son contributes to his aged parent a fixed sum, say one hundred dollars annually, and that from the wrongful act of another he dies, leaving such parent by his will a legacy of ten thousand dollars. Can it be reasonably asserted that the parent has suffered any pecuniary loss by the death of the son? But we need not go outside of this case for an illustration.

If there was any great disparity in the aid extended by Mrs. Long in her lifetime to each of her children the evidence does not disclose it. By her will she left her property, amounting to nearly twenty thousand dollars in value, to

her daughters, and gave her sons nothing. If the sons shared equally in her bounty with her daughters during her life can it be said that their ¹⁵⁷ loss is no greater than that of the daughters? It seems to us absurd to say so.

It will not do to say, as some of the courts have said, that to permit a defendant in a case of this character to show that the plaintiff had received a pecuniary benefit resulting from the death of the deceased would enable a wrongdoer to protect himself against the consequences of his wrong. Except for willful misconduct or gross negligence exemplary damages are not allowed by the statute. In other cases actual damages only are given, and the recovery is free from any element whatever of a penal nature. The argument is not a legitimate application of the principle that a wrongdoer cannot take advantage of his own wrong. Its main support rests upon a sentiment—a consideration which should not be resorted to in order to change the provisions of the written law. The statute is intended in case of mere ordinary negligence to give compensation for a pecuniary loss; and the question is, what is the amount of this loss, if any? This is a practical question, and it should in any such case be tried and determined in a reasonable and practical manner.

The English statute, known as Lord Campbell's Act, upon which most, if not all, of the statutes of a like character in this country have been modeled, is in respect to the beneficiaries very nearly the same as the statute of this state. The action is for the benefit of "husband, wife, parent, and child" of the deceased, and the jury are to apportion the damages among the beneficiaries. The only substantial difference is that Lord Campbell's Act provides that under the term "parents" shall be included "grandparents."

In an action brought under that act Lord Campbell, himself, who presided at the trial, instructed the jury that in assessing the damages they should take into consideration the amount received by the beneficiaries on an accident insurance policy held by the deceased: *Hicks v. Newport etc. Ry. Co.*, cited in note to *Pym v. Great Northern Ry. Co.*, 4 Best & S., 403.

Speaking of this case Baron Bramwell, in *Bradburn v. Great Western Ry. Co.*, L. R. 10 Ex. 1, says: "As to the case of *Hicks v. Newport etc. Ry. Co.*, that was an action under Lord Campbell's Act, and the ruling is quite correct. The

statute had laid down no rule as to the mode of calculating the damages to be given in respect of the right of action which it created. The rule was first laid down by this court, and that rule was that the damages were to be a compensation to the family of the deceased equivalent to the pecuniary benefits which they might have reasonably expected from the continuance of his life. If, therefore, the person claiming damages was put by the death of his relative into possession of a large estate, there was no loss; he was a gainer by the event; and, similarly, whatever comes into the possession of the family who have suffered by the death of their relative, by reason of his death, must be taken into the account."

¹⁵⁸ In *Jennings v. Grand Trunk Ry. Co.*, L. R. 13 App. Cas. 800, it is said, "that all the circumstances which, though insufficient to exclude a statutory claim, may be legitimately pleaded in diminution of it, ought to be submitted to the decision of the jury, whose special function it is to assess the damage, with such observations by the presiding judge as may be suggested by the facts in evidence. It appears to the court that money provisions made by a husband for the maintenance of his widow, in whatever form, are matters proper to be considered by the jury in estimating her loss; but the extent, if any, to which these ought to be imputed in the reduction of damages must depend upon the nature of the provision and the position and means of the deceased. Where the deceased did not earn his own living, but had an annual income from property, one-half of which has been settled upon his widow, a jury might reasonably come to the conclusion that, to the extent of that half, the widow was not a loser by his death, and might confine the estimate of her loss to the interest which she might probably have had in the other half."

This is from a decision of the privy council in a case arising under a Canada statute which is the same as Lord Campbell's Act. But neither the expressions on this question in the case last cited, nor in *Bradburn v. Great Western Ry. Co.*, L. R. 10 Ex. 1, are authoritative. The point was not involved in either case; and yet they are entitled to weight as the opinion of very able judges. The court of the exchequer chamber took substantially the same view of the question, as is shown by the case of *Pym v. Great Northern Ry. Co.*, 3 Best & S. 403.

On the other hand there are several decisions which hold that proof that a beneficiary has received money from a policy of insurance on the life of the deceased cannot be received for the purpose of reducing the damages: *Althorf v. Wolfe*, 22 N. Y. 355; *Sherlock v. Alling*, 44 Ind. 184; *Harding v. Townshend*, 43 Vt. 536; 5 Am. Rep. 304; *Baltimore etc. R. R. Co. v. Wightman*, 29 Gratt. 431; 26 Am. Rep. 384; *Carroll v. Missouri Ry. Co.*, 88 Mo. 239; 57 Am. Rep. 382; *Western etc. R. R. Co. v. Meigs*, 74 Ga. 857.

Statutes giving damages for injuries resulting in death necessarily deal with probabilities; so that where there is a policy on the life of the deceased payable to the beneficiaries, under the statute, the probability is or may be that if the deceased had continued to live the beneficiaries would ultimately have received the insurance money. Hence they have gained nothing by the premature death, except an acceleration of the payment. Perhaps sound principles would require the jury to take into consideration the use of the money during the period of acceleration: *Jennings v. Grand Trunk Ry. Co.*, L. R. 13 App. Cas. 800.

But, however that may be, the case is very different when the only aid which the beneficiaries have received from the deceased during his life has been a part of the income of his property, and when upon his death the title to the corpus of such property absolutely vests in them; and we are ¹⁵⁹ therefore of the opinion that in a case involving similar facts they should be admitted in evidence, to be considered by the jury.

We conclude that the court erred in excluding the will of Mrs. Long, and that for this error the judgment must be reversed.

There are other questions presented by the writ of error, but we need not consider them either at length or in detail. They were correctly disposed of by the court of civil appeals. There is, however, one point which we desire to notice. It is insisted that the court should have charged the jury, in effect, that the plaintiffs were entitled to recover only for the loss of such pecuniary benefits to them as would have resulted "from the mental or bodily labor" of the deceased. The object of the refused charge was to exclude from the consideration of the jury prospective benefits which might have accrued to the beneficiaries from that portion of the income of deceased which proceeded from her property. From what

has already been said, it is apparent that we think that the charge was correctly refused.

The contention of plaintiffs in error seems to be based upon the case of *Pennsylvania R. R. Co. v. Butler*, 57 Pa. St. 335, in which the court in their opinion say: "After an attentive examination and review of all the cases which have heretofore been decided, we are of the opinion that the proper measure of damages is the pecuniary loss suffered by the parties entitled to the sum to be recovered—in this instance the children of the decedent—without any solatium for distress of mind; and that loss is what the deceased would probably have earned by his intellectual and bodily labor in his business or profession during the residue of his lifetime, and which would have gone for the benefit of his children, taking into consideration his age, ability, and disposition to labor, and his habits of living and expenditure."

The rule thus announced is doubtless correct as applied to the facts of the particular case, and it may be applicable generally under the statute of Pennsylvania. It does not apply under the statute of this state to a case like the present, in which the prospective aid was mainly, if not wholly, from the income of property, and in which, upon the death, some of the beneficiaries take by bequest all the estate, and others get none.

In conclusion, we will say, that while the damages in actions of this nature are necessarily indeterminate, and while much must be left in almost every case of the kind to the sound sense of the jury, it does not follow that the plaintiffs need not prove with a reasonable degree of certainty the data from which their compensation is to be assessed, when it is practicable to do so. When the beneficiaries are adults, and the loss of prospective benefits is based upon assistance in the way of money or other things of value received in the lifetime of the deceased, it is certainly within the power of each beneficiary to show by his own testimony with some degree of accuracy the amount of the benefits so received. And it ¹⁶⁰ would seem that his failure to testify specifically to the facts ought to be deemed a circumstance against him sufficient to justify the trial court in setting aside the verdict, provided it be apparently excessive.

The judgments of the court of civil appeals and of the district court are reversed and the cause remanded.

DAMAGES TO CHILDREN FOR DEATH OF THEIR PARENTS may include the loss of nurture, instruction, and physical, intellectual, and moral training, as well as mere support: Note to *Louisville etc. Ry. Co. v. Goodykoontz*, 12 Am. St. Rep. 382. See, also, the note to *McElligott v. Randolph*, 29 Am. St. Rep. 188.

WITNESSES—INFERENCES.—After a witness has stated facts he cannot testify as to his inferences. They are for the jury: *Enos v. St. Paul etc. Ins. Co.*, 4 S. D. 639; 46 Am. St. Rep. 796, and note.

EAST TEXAS FIRE INSURANCE CO. v. KEMPNER.

[87 TEXAS, 229.]

INSURANCE—VACANCY OF PREMISES.—If a policy of insurance provides that if the insured building should become vacant or unoccupied without the consent of the company indorsed on the policy it shall at once become null and void, and any unearned premium will be returned on a surrender of the policy, a temporary vacancy of the building, though without the knowledge of the owner, terminates the policy and the subsequent reoccupancy of the building does not revive the policy unless the forfeiture has been waived.

Whitaker & Bonner, for the plaintiff in error.

Rector & Harris, for the appellee.

225 BROWN, A. C. J. The East Texas Fire Insurance Company issued to H. Kempner, upon a brick storehouse, a policy of insurance which contained the following clauses:

“ART. 2. This policy shall become void unless consent in writing is indorsed by the company hereon in each of the following cases:

“SEC. 3. If the risk be increased by any change in the occupation of 226 the building or premises herein described, or by the erection or occupation of adjoining buildings, or by any means whatever within the knowledge of the assured.

“SEC. 4. It is a rule of this company not to insure any vacant or unoccupied building, and if any building herein described be or become vacant or unoccupied for the purposes indicated in this contract, without the consent of the company indorsed thereon, this policy shall at once become null and void, and any unearned premium on the same will be refunded to the assured on the surrender of this policy.”

The house was leased by Kempner to one Northrup for two years, who, without Kempner's consent sublet it to another for a part of the term. The subtenant moved out of the building on Saturday, and on the succeeding Wednesday

another tenant moved into it, it being again sublet by Northrup, without the consent or knowledge of Kempner, who lived at Galveston. Some time afterward, and during this last occupancy, the house was destroyed by fire. Kempner did not know that the house was vacant. Kempner sued upon the policy, and the insurance company pleaded, among other things not necessary to notice, that the policy was rendered void by the house becoming vacant, and not having the consent of the company. Judgment was given for plaintiff below for the amount of the policy, which was affirmed by the court of civil appeals.

The plaintiff in error presents the case to this court upon a number of objections to the judgment of the court of civil appeals, all of which have been disposed of satisfactorily by that court, except the third, which is as follows: "The court erred in holding that the policy was not vitiated by the insured premises becoming vacant, the terms of the policy being that if the property insured be or become vacant the policy should at once become null and void." The court of civil appeals held that a temporary vacancy would not render the policy void, and that the vacancy in this instance was of that character.

The rule for construing a policy of insurance is, that the language used in it "must be liberally construed in favor of the assured, so as not to defeat, without a plain necessity, his claim to indemnity, which, in making the insurance, it was his object to secure. When the words are, without violence, susceptible of two interpretations, that which will sustain his claim and cover the loss must in preference be adopted": 1 May on Insurance, sec. 176. It is equally well settled that, where the language is plain and unambiguous, courts must enforce the contract as made by the parties, and cannot make a new contract for them, nor change that which they have made, under the guise of construction. As parties bind themselves so they must be held to be bound: *Galveston Ins. Co. v. Long*, 51 Tex. 92; *Morrison v. Insurance Co. of North America*, 69 Tex. 359; 5 Am. St. Rep. 63.

²²⁷ In numerous cases it has been held that temporary absence from a dwelling-house, while the household goods remain, does not render the house vacant within the meaning of such clauses in policies of insurance. This line of authority is fairly represented by *Franklin Fire Ins. Co. v. Kepler*, 95 Pa. St. 492.

It is also held, in many cases, that where the tenant has moved out and the owner or another tenant has moved into the house a part of the household goods, and is preparing to take possession, a vacancy does not occur: *Eddy v. Hawkeye Ins. Co.*, 70 Iowa, 472; 59 Am. Rep. 444.

A policy of insurance was issued upon a manufacturing establishment, containing a condition that in case the property became vacant or ceased to be operated the policy should become void. On account of an epidemic of yellow fever the owners ceased for a time to operate the mill, and it was held that the condition of the policy was not broken: *Pose v. Western Assur. Co.*, 7 Lea, 704; 40 Am. Rep. 68; *Whitney v. Black River Ins. Co.*, 72 N. Y. 118; 28 Am. Rep. 116.

In *Ridge v. Scottish etc. Ins. Co.*, 9 Lea, 507, the policy provided that in case the house should become vacant the policy would be void. The tenant moved out, and in a few days the house burned. It was held that the company was not liable. In that case, however, the court said that if the house had been reoccupied before the fire it would have held that the language meant that the policy was to be void only during the vacancy.

In the case before the court the policy is exceptionally explicit and apt in the statement of the terms of liability. It is first stated that the company will not insure vacant houses; and, to enforce the rule with certainty, it is provided that if the house should become vacant or unoccupied without the consent of the company the policy shall at once become null and void. The words "at once" clearly and unmistakably express the intention that the fact of becoming vacant annulled the policy. It was not to be void for an indefinite time, nor to become void in the future, but now and forever.

This intention is rendered still more certain by the further provision that the unearned premium should, upon the surrender of the policy, be returned to the assured. The relation of assured and assurer was then and there to terminate; the business was to be closed up at once.

All business houses when vacant are so temporarily in the contemplation of the owner, who either intends to occupy himself or to rent to some other person as soon as he can do so. If a court can say that a condition like that contained in this policy does not include temporary vacancies, then what period will be inserted into each contract, by construc-

tion, during which the policy shall remain in force? If we can say three days, why not a month, three months, or even six months, according to the opinion of the court? Plaintiff was required to know the terms of his policy, the contract that he made, and to ²³⁸ know the condition of his property and to provide for its protection. This was not a duty of the insurance company.

It was lawful for the parties to make the contract embraced in this policy, and it was not unreasonable on the part of the insurance company to stipulate for exemption from liability in case of the vacancy of the building. The language used was not calculated to mislead the plaintiff; by proper attention to his affairs he would know what security the policy afforded him. The language indicates that the intention was to exclude judicial construction by making the terms unambiguous, and the court must enforce the contract as made.

The district court and court of civil appeals erred in holding that the policy did not become null upon the happening of the contingency, the vacation of the premises; reoccupancy did not revive the policy, unless the forfeiture was waived. *Moore v. Phoenix Ins. Co.*, 62 N. H. 240; 13 Am. St. Rep. 556. The judgments of the district court and court of civil appeals are reversed, and the cause is remanded to the district court for trial in accordance with this opinion.

INSURANCE—VACANCY OF PREMISES.—An insurer is not liable on a policy stipulating that it shall be void if the premises are vacant and unoccupied for a certain length of time, when they have been unoccupied for such period at the time of the fire, although the local agent believed them to be occupied and did nothing to mislead the insured: *Home Ins. Co. v. Scales*, 71 Miss. 975; 42 Am. St. Rep. 512, and note, with the cases collected.

MEXICAN CENTRAL RAILWAY CO. v. LAURICELLA.

[87 TEXAS, 277.]

EVIDENCE—BURDEN OF PROOF OF NEGLIGENCE.—Though from the derailment of a railway train and the injury of the plaintiff riding thereon as a passenger a presumption of negligence arises, it is not proper to instruct the jury that it devolves upon the plaintiff to establish by evidence of a preponderating weight that the accident was not the result of negligence. The burden of proof is not upon the defendant, and therefore if the evidence upon the issue of negligence does not preponderate on either side, the defendant is entitled to a verdict.

NEGLECT, PRESUMPTION OF.—WHEN AN ACCIDENT HAPPENS on a railway train from which a passenger sustains injury by the breaking down of the carriage, or by the running off of the train, or by the spreading of the rails, the very nature of the occurrence is prima facie evidence of the negligence of the company and its servants.

JURY TRIAL—HARMLESS ERROR.—Though a charge to the jury is erroneous, yet, if it manifestly works no injury to the losing party, the judgment will not be reversed.

RAILWAYS—NEGLECT.—Where it appeared that a railway train ran over a bull upon the track, and that he was left in a crippled condition so close to the track that he floundered upon it and caused the derailment of another train, or, though not crippled, he was left near the track, and no lookout was kept, as a consequence of which a later train again collided with him, in either event negligence is shown on the part of the railway corporation and its servants, entitling a passenger to recover for injuries received in the second accident.

J. P. Hague, T. A. Falvey, and Waters Davis, for the plaintiff in error.

W. B. Brock, and Stanton & Turney, for the defendant in error.

278 GAINES, C. J. The defendant in error brought this suit against the Mexican Central Railway Company to recover damages 279 for personal injuries. He with others were being transported over the road of the defendant company upon a freight train, under a contract of passage made with the company by his employer. There was a derailment of the train upon which he was being carried, and he was thereby injured. His relation to the company was that of a passenger. The train consisted of freight cars to which a caboose was attached, and he took his position upon a car which was loaded in part with piles. It was alleged that the accident was caused by the running of the train at a dangerous rate of speed, by the negligent manner in which the piling was loaded upon the cars, and by negligently running over a bull which was found upon the track. The company

denied its negligence, and also pleaded that plaintiff was guilty of contributory negligence in not taking passage upon the caboose, where he would have escaped injury, and in taking a position upon the freight car where he was subjected to increased risk. This writ of error is prosecuted for the purpose of reversing a judgment of the court of civil appeals, which affirmed the judgment of the trial court in his favor.

The court upon the trial charged the jury, in substance, that they should find for the plaintiff if they believed that the accident was caused either by the running of the train at a dangerous rate of speed, or by the negligent loading of the piles, or by the failure to keep a careful lookout for obstructions on the track, or by two or more of these causes combined, unless they should find as thereafter instructed; and proceeded to instruct them, in effect, that if they believed from a preponderance of evidence that the train was not run at a dangerous rate of speed, and that the piles were not negligently loaded on the cars, and that the employees of the company did not fail to keep a proper lookout, they should find for the defendant. Then followed a charge upon contributory negligence, to which no objection is made. Upon the issues as to the negligence of the defendant, the charge shifted the burden of proof and placed it upon the company, and was therefore erroneous. Although the derailment of the train may have been sufficient to raise the presumption of negligence, yet it did not devolve upon the defendant the duty of showing by evidence of a preponderating weight that the accident was not the result of its negligence. It was entitled to a verdict if the evidence upon the issue was balanced—that is, if it preponderated on neither side: *Clark v. Hills*, 67 Tex. 148.

It does not follow, however, as we think, that the judgment should be reversed. “Where an accident happens upon a railway from which a passenger sustains an injury by the breaking down of the carriage, or by the running off of the train, or by the spreading or the breaking of the rails, the very nature of the occurrence will be prima facie evidence of negligence in the company or its servants”: Hutchinson on Carriers, sec. 800. The rule thus stated by the eminent author cited is ²⁸⁰ very generally recognized: *Dawson v. Railway Co.*, 7 Hurl. & N. 1037; *Carpus v. London etc. Ry. Co.*, 5 Ad. & E., N. S., 747; *Feital v. Middlesex R. R. Co.*, 109 Mass. 398; 12 Am. Rep. 720; *Curtis v. Rochester etc. R. R. Co.*, 18 N. Y.

534; 75 Am. Dec. 258; *Edgerton v. New York etc. R. R. Co.*, 39 N. Y. 227; *George v. St. Louis etc. Ry. Co.*, 84 Ark. 618; *Pittsburgh etc. R. R. Co. v. Williams*, 74 Ind. 462; *Tuttle v. Chicago etc. Ry. Co.*, 48 Iowa, 236; *Chicago etc. R. R. Co. v. George*, 19 Ill. 510; 71 Am. Dec. 239. The rule is also recognized in *Gulf etc. Ry. Co. v. Smith*, 74 Tex. 278, although the decision in that case cannot be deemed an authoritative ruling upon the point. It is a reasonable and sound doctrine that when a passenger is injured by an accident, such as the derailment of a train at a place where the track and train are entirely under the control of the company—that is to say, where they are not interfered with by any extraneous force—a presumption of negligence arises, and that in order for the company to exonerate itself from liability for the injury it must adduce evidence to show that the accident could not have been avoided by the exercise of the utmost care and foresight reasonably compatible with a prosecution of its business.

The defendant upon the trial of this case sought to excuse the accident by showing that it was caused by a bull upon the track, which was not discovered by the servants of the company in charge of the train. It introduced testimony to show that the bull had been struck by another train which had passed some hours before the time of the accident, and had been left in a crippled condition so close to the side of the track that it was struck by the step of the engine and made to flounder under the cars, and thereby to cause the derailment. If this be true, we are clearly of the opinion that the accident was the result of the negligence of the company's servants in charge of the train that first struck the bull and left it wounded upon the side of the track. When the wreck occurred the engine and tender with two cars remained upon the track and ran two miles or more before the engineer discovered the cars in the rear had become uncoupled. The fireman who was upon the engine testified upon the trial, and it is evident that he knew nothing about the bull's being upon the track until long after the accident had happened. The engineer was not examined. If a lookout was kept the company did not show it. If the bull was upon the track it would seem that by the use of proper diligence it might have been discovered in time to have been frightened out of the way of the train. There was no attempt to prove that the animal rushed suddenly upon the track

from some cover where he could not have been seen if there had been a lookout. If, therefore, the defendant's witnesses were mistaken in their theory that the bull was crippled and lying very near the track, and if the bull had merely strayed upon it and was uninjured, it appears that a proper lookout might have discovered it in time to have averted the danger. It was testified that the animal, it being in the night-time, could not have been discovered at a greater distance than four hundred yards, and that the train could not have been stopped under one thousand yards. ²⁸¹ Yet it was negligent not to keep a lookout, so as to discover it in time to blow the whistle, and thereby, if possible, to frighten it off the track. In short, if the bull had been crippled by one train and left sufficiently near the track so as to be struck by another, this was negligence; if it was uninjured, it was equally negligent not to have discovered it and to have blown the alarm in order to frighten it away.

In our opinion, therefore, the testimony upon the issue of the defendant's negligence fails to show that the accident might not have been avoided by the exercise of that high degree of care required of carriers of passengers, and wholly fails to meet the presumption arising under the circumstances from the fact of the derailment. The evidence clearly shows a derailment. We are therefore of the opinion that the evidence showed that the company was negligent, and warranted the jury in coming to no other conclusion. It is therefore manifest that the erroneous charge worked no injury to the defendant, and in such a case the judgment will not be reversed: *Galveston etc. R. R. Co. v. Delahunty*, 53 Tex. 212, and cases there cited. It may also be doubted whether the jury were misled by the instruction, since they were told in the last paragraph of the charge that the burden of the proof was upon the plaintiff to show by a preponderance of evidence his right to recover.

The trial judge, in overruling the motion for a new trial, expressed a doubt as to the sufficiency of the evidence, and it is assigned that for that reason it was error not to grant the motion. It may be that the opinion of the learned judge as to the weight of the evidence should have constrained him to set aside the judgment; but the fact remains that he refused the motion, and thereby approved the verdict. In determining the question raised by the assignment upon the court's ruling in this particular, the court of civil appeals

properly considered only the evidence as shown by the statement of facts, and not the reasons given by the judge for his ruling. The conclusion of that court is final upon the question, and we have no power to revise it.

We presume the doubt of the trial judge as to the correctness of the finding of the jury must have been as to the issue of contributory negligence. Upon that issue the testimony was conflicting. But the charge of the court very clearly presents the law of contributory negligence as applicable to the particular facts of the case, and no error has been assigned upon the instructions in that particular.

For the reasons given the judgments of the court of civil appeals and that of the trial court are affirmed.

CARRIERS—NEGLIGENCE—BURDEN OF PROOF.—The occurrence of an accident to a passenger is prima facie evidence of negligence on the part of the carrier, throwing upon it the burden of rebutting the presumption by proof that there was no negligence: *Philadelphia etc. R. R. Co. v. Anderson*, 72 Md. 519; 20 Am. St. Rep. 483, and extended note. A passenger by railway makes a prima facie case of negligence against the company by showing the facts of the derailment of the cars and his injury. The burden of proof then rests on the company to show that it has not been negligent: *Furnish v. Missouri Pac. Ry. Co.*, 102 Mo. 438; 22 Am. St. Rep. 781, and note. See, also, the note to *Baltimore etc. R. R. Co. v. State*, 32 Am. St. Rep. 377.

CARRIERS—NEGLIGENCE, PRESUMPTION OF FROM HAPPENING OF ACCIDENT.—Injury to a passenger in consequence of something done or not done by the carrier or his employees, or connected with the appliances of transportation, raises a presumption of negligence which the carrier is required to rebut: *Fleming v. Pittsburgh etc. Ry.*, 158 Pa. St. 130; 38 Am. St. Rep. 835, and note, with the cases collected. This question is the subject of monographic notes to *Long v. Pennsylvania R. R. Co.*, 30 Am. St. Rep. 736, and *Philadelphia etc. R. R. Co. v. Anderson*, 20 Am. St. Rep. 490.

CHEEVES v. ANDERS.

[87 TEXAS, 287.]

LIFE INSURANCE, INSURABLE INTEREST.—Public policy does not allow any one having no insurable interest to be the owner of a policy of insurance upon the life of a human being. The public has an interest, independent of the consent and concurrence of the parties, that no inducement shall be offered to one man to take the life of another.

LIFE INSURANCE.—IF A POLICY IS ASSIGNED TO A PERSON HAVING NO INSURABLE INTEREST in the life of the person insured, such assignee will hold the proceeds as trustee for the benefit of those entitled to receive them.

LIFE INSURANCE—LIMIT OF INTEREST IN LIFE OF ANOTHER.—If the interest which one person has in the life of another is of a definite character, as where he is a creditor, or when he from the life of the insured may reap some pecuniary advantage of a definite nature, and the policy is taken out in his favor or is assigned to him, his interest will be limited to the amount of interest which he has in the amount of the insurance, together with such amount as he has paid to procure the policy with interest thereon.

LIFE INSURANCE.—WANT OF INSURABLE INTEREST on the part of an assignee of a life insurance in the person whose life is insured does not release the insurer. He must perform his contract, leaving the law to dispose of the proceeds among the persons found entitled thereto.

LIFE INSURANCE.—THE INSURABLE INTEREST WHICH ONE PARTNER HAS AS SUCH IN THE LIFE OF ANOTHER ceases on the dissolution of the firm.

LIFE INSURANCE.—THE INSURABLE INTEREST WHICH A PARTNERSHIP HAS IN THE LIFE OF ONE OF ITS MEMBERS, where he does not owe the firm anything and its property is sufficient to discharge its obligations, is limited to the premiums paid out of the partnership assets, with interest thereon. Therefore, on the death of the insured partner, his heirs or representatives are entitled to all the proceeds of the insurance upon his life, except such as will reimburse the other partner for his share of the moneys paid for such insurance, with interest.

John L. Dyer, for the plaintiff in error.

J. A. Martin, for the defendant in error.

290 BROWN, A. J. J. H. Anders, as administrator of L. B. Chilton, brought this suit in the district court of Falls county to recover the amount of a policy issued by the New York Life Insurance Company for ten thousand dollars, payable to Cheeves and Chilton, or their administrators or assigns, making the insurance company and Cheeves defendants. The insurance company did not deny liability, and the 291 contest was between the plaintiff and Cheeves as to the right to receive the proceeds from the policy.

Cheeves filed an answer, in which he pleaded that he was entitled to the proceeds of the policy as against the company and plaintiff, because at the time of issuing the said policy, on the seventeenth day of May, 1889, he and the deceased, L. B. Chilton, were partners engaged in a mercantile business in Falls county, and that the said partnership procured the issuance of the said policy of insurance upon the life of the said Chilton, and paid the premium thereon, five hundred and ninety dollars, out of and with the money and assets of said firm, and that thereafter, on April 23, 1890, the said firm paid out of its assets another premium of five hundred and ninety dollars upon said policy, which kept it in force until the death of Chilton.

It is alleged in the answer that at the same time another policy was issued by the said insurance company payable to Cheeves & Chilton, or their administrators or assigns, upon the death of T. A. Cheeves, and for the like sum of ten thousand dollars, upon which premiums were paid out of the assets of the said firm amounting to an equal sum as that paid upon the policy in suit. That on the twenty-third day of September, 1890, the firm of Cheeves & Chilton was dissolved, and Chilton, for a consideration of about twenty thousand five hundred dollars, by writing conveyed to Cheeves all of his right and claim in and to all of the partnership property and rights of every kind, the language being set out broadly enough to include all interest that the firm had in the policy at the time of the transfer.

Chilton died November 7, 1890, and proofs of loss were duly furnished. Cheeves claims that he was interested in the life of Chilton as his partner at the time the policy was issued, and also that Chilton transferred the policy to him. He closed his answer with a prayer for general relief. There is no allegation in the answer that L. B. Chilton was indebted to the firm of Cheeves & Chilton, or to Cheeves, or in what respect Cheeves had any interest in the life of Chilton, except simply that he was a partner when the policy was issued.

Plaintiff filed a general demurrer to the answer, which the court sustained, and upon trial without a jury gave judgment for the plaintiff against both defendants for the whole amount of the policy, which judgment was by the court of civil appeals affirmed.

It is against the public policy of this state to allow any one who has no insurable interest to be the owner of a policy of insurance upon the life of a human being: *Price v. Knights of Honor*, 68 Tex. 361; *Schonfield v. Turner*, 75 Tex. 329; *Equitable Life Ins. Co. v. Hazlewood*, 75 Tex. 351; 16 Am. St. Rep. 893.

In some states it is held that an element of wagering likewise enters into such contracts, which has led, as we believe, to inconsistencies in the decisions in some of the courts. Our court has placed the inhibition against such contracts upon the higher and sounder ground that ²⁹² the public, independent of the consent or concurrence of the parties, has an interest that no inducement shall be offered to one man to take the life of another. Making this the test in every

phase of such cases, there can be no inconsistency in our decisions, and the public good will be better guarded.

Applying this salutary rule, the conclusion has been reached by our courts that such policy cannot be beneficially owned by any one not interested in the life insured, whether the policy be taken out in the first instance by the noninterested party, with or without the consent of the insured, or that he acquired the policy by assignment from the person whose life is insured, or from another who had an insurable interest.

A man may insure his own life, making the policy payable to his legal representatives, and afterward assign it to any one, or he may procure such policy and make it payable to any person that he may name, but in either case, if the person to whom it is assigned or who is named in the policy has no insurable interest, he will hold the proceeds as a trustee for the benefit of those entitled by law to receive it: *Price v. Knights of Honor*, 68 Tex. 361; *Schonfield v. Turner*, 75 Tex. 329.

The law permits one who is interested in the life of another to become the owner of insurance upon the life of such other person, either by contracting with the insurance company, or by contract made by the party whose life is insured, or by assignment of the policy after it is issued. If, however, the interest is of a definite character, as that of a creditor of the insured, or of one who may from the life of the insured reap some pecuniary advantage of a definite nature, the interest of the holder of such policy will be limited to the amount of such liability at the death of the insured, together with such amount as he has paid to preserve the policy, with interest thereon, and the remainder will be given to the estate of the party insured: *Price v. Knights of Honor*, 68 Tex. 361; *Schonfield v. Turner*, 75 Tex. 324; *Equitable Life Ins. Co. v. Hazlewood*, 75 Tex. 338; 16 Am. St. Rep. 893; *Goldbaum v. Blum*, 79 Tex. 638. If the interest of the policy-holder should cease before the death of the insured, or if the debt and premiums advanced should be paid, then the whole of the policy will go to the estate of the insured.

When an insurance company has issued a policy upon the life of a person, payable to one who has no insurable interest in the life insured, or when a policy has been assigned to one having no such interest, the insurance company must nevertheless pay the full amount of the policy, if otherwise

liable, because it has so contracted, and it is no concern of the insurer as to who gets the proceeds, except to see that it is paid to the proper parties under its agreement. It is simply required to perform its contract, and the law will dispose of the money according to the rights of the parties: *Pacific Mut. Life Ins. Co. v. Williams*, 79 Tex. 637, and authorities cited.

298 This rule does no wrong to the insurance company. It having agreed to pay the money on the death of a named person ought not to be permitted to avoid liability upon its contract upon the ground that it has made an unlawful agreement, when that contract can be enforced in favor of a person who is in nowise concerned in the unlawful part of the transaction. It is held by the courts of this and other states that when one secures a policy upon his own life and transfers it to another who has no insurable interest, the want of insurable interest cannot be set up as a defense by the insurance company; the policy or the assignment is not void as to the insurance company, but will be enforced. If this be correct, then why should it be said that the policy issued by the company contrary to law should be held void as to it? The reason would seem to be equally strong to enforce the contract in favor of one who was entirely innocent of participation, as in favor of him who voluntarily places the insurance in the name of one who cannot lawfully receive it. If the insurance company may set up the illegality of such a contract, then the object of the law will be frustrated and the making of such unlawful agreements by insurance companies will be encouraged, for they would thus be enabled to reap the benefit without incurring the risk of such business. If the insurer is held liable, and the payee in a policy is denied its benefits when unlawfully obtained, both parties to the unlawful contract will be denied relief, and the beneficial objects of insurance upon the life be attained by giving the benefits to the estate of the insured, and no inducement will be offered to destroy the life upon which the risk is placed.

It is generally held that where one having an interest in the life of another obtains a policy upon such life, and the interest ceases before death, the person named in the contract as payee or the assignee of such policy may maintain suit against the insurance company: *Mutual Life Ins. Co. v. Allen*, 138 Mass. 124; 52 Am. Rep. 245; *Connecticut etc. Ins. Co. v. Schaefer*, 94 U. S. 457; *McKee v. Phoenix Ins. Co.*, 28 Mo. 383;

75 Am. Dec. 129. These cases do not determine as to how the proceeds shall be distributed, and are not in conflict with the former decisions of this court. It has, however, been held that where the interest existed at the time of making the contract, but ceased before death, the person to whom the policy is made payable may recover and hold the entire amount of the policy as against the claim of the representatives of the insured: *Scott v. Dickson*, 108 Pa. St. 6; 56 Am. Rep. 192; *Rittler v. Smith*, 70 Md. 261; *Amick v. Butler*, 111 Ind. 578; 60 Am. Rep. 722. This we regard as opposed to the paramount reason for holding such insurance to be unlawful, that is, the danger in offering an inducement to destroy human life. If the inhibition against such transactions be that they are considered wagering contracts, as appears to be the ground upon which the decisions cited are placed, it is consistent to hold as in the cases quoted. If, however, the making of such agreements be placed upon the ground that it is against public policy for one to be ²⁹⁴ interested in the death of another when he has no interest in the continuance of his life, the decisions cannot be sustained upon principle. The want of insurable interest is just as absolute where it has ceased as where it never existed, and the inducement to destroy the life insured for gain is just as strong in the one case as in the other.

We cannot disregard the sound principles established by our courts and follow a line of decisions to the contrary, however eminent the courts or numerous the cases. We therefore hold that in this case the interest which Cheeves may have had in the policy as partner, aside from his interest, which was joint with Chilton and therefore belonged to the partnership, ceased at the dissolution of the firm, and will not sustain his claim to the proceeds of this policy.

The language of the assignment made by Chilton to Cheeves is sufficient to convey to the latter all the interest of the firm in this policy. This brings us to the inquiry as to what interest the firm of Cheeves & Chilton had in this policy at the date of the dissolution.

We will not undertake to enumerate the different phases of facts in which the firm might be interested in such a policy, nor when it might be regarded as assets of the firm for the whole amount. It is sufficient to say that no such state of facts is alleged as gives to the firm such right, nor to the claimant Cheeves any right by reason of a liability for the

debts of the firm. The answer shows that Chilton did not owe the firm any remaining debt, and that the property was more than sufficient to pay all firm debts, for Cheeves assumed all such debts, and in addition paid to Chilton several thousand dollars for his interest therein. The firm had no right to the policy as such. The answer, however, does allege that the premiums upon the policy to amount of eleven hundred and eighty dollars were paid by the firm out of its assets, and this would create a charge upon this policy in favor of the firm, with the right to be reimbursed with interest out of the proceeds of the policy, the same as if it had been paid by a creditor whose debt had been paid, or when the debt was not equal to the amount named in the policy. This right existed in the firm at dissolution, and by the transfer of Chilton passed to Cheeves.

The facts upon which the right arises are alleged in the answer, and there is a prayer for general relief, which was sufficient to entitle Cheeves to whatever the law would accord him upon the alleged facts. It was error to sustain the general demurrer to this answer because it showed a right in the defendant Cheeves to some relief, although not to the whole amount in controversy.

The insurance company does not complain of the judgment, and it will be affirmed as to the New York Life Insurance Company. Because of the error of the district court in sustaining a demurrer to the answer of T. A. Cheeves, and the error of the court of civil appeals in failing to reverse said judgment for that error, the judgments of both courts are reversed as to plaintiff J. H. Anders, administrator of ²⁹⁵ L. B. Chilton, and defendant Cheeves, and this cause is remanded to the district court for further proceedings in accordance with this opinion, to ascertain the rights of the said Anders, administrator, and Cheeves in the proceeds of said policy.

INSURANCE—LIFE—NECESSITY FOR INSURABLE INTEREST.—A party insuring must have an interest in the life to be insured when the insurance is effected for his own benefit, or the policy will be void: *Mitchell v. Union etc. Ins. Co.*, 45 Me. 104; 71 Am. Dec. 529, and note; *United etc. Aid Society v. McDonald*, 122 Pa. St. 324; 9 Am. St. Rep. 111, and note. This question will be found fully discussed in the notes to *Holmes v. Gilman*, 34 Am. St. Rep. 472, and the extended notes to *Morrell v. Trenton Ins. Co.*, 57 Am. Dec. 93; *Continental etc. Ins. Co. v. Volger*, 46 Am. Rep. 189, and *Currier v. Continental etc. Ins. Co.*, 52 Am. Rep. 135.

INSURANCE—LIFE—ASSIGNMENT OF POLICY TO ONE NOT HAVING INSURABLE INTEREST IN LIFE OF INSURED.—The assignee of a policy of insurance need not have an insurable interest in the life of the insured in order to entitle him to recover the amount of the insurance: *St. John v. American etc. Ins. Co.*, 13 N. Y. 31; 64 Am. Dec. 529, and note; *Mutual etc. Ins. Co. v. Allen*, 138 Mass. 24; 52 Am. Rep. 245, and note; *Bursinger v. Bank*, 67 Wis. 46; 58 Am. Rep. 848; *Clark v. Allen*, 11 R. I. 439; 23 Am. Rep. 496. The contrary doctrine is maintained by the following line of cases: *Franklin etc. Ins. Co. v. Hazard*, 41 Ind. 116; 13 Am. Rep. 313; *Missouri etc. Ins. Co. v. Sturges*, 18 Kan. 93; 26 Am. Rep. 761, and note; *Helmetag v. Miller*, 76 Ala. 183; 52 Am. Rep. 316; *Missouri etc. Ins. Co. v. McCrum*, 36 Kan. 146; 59 Am. Rep. 537. See, also, the notes to *Curtis v. Aetna etc. Ins. Co.*, 25 Am. St. Rep. 123; *Equitable etc. Ins. Co. v. Hazlewood*, 16 Am. St. Rep. 907; *Singleton v. St. Louis Ins. Co.*, 27 Am. Rep. 327, and *Bursinger v. Bank*, 58 Am. Rep. 852.

INSURANCE—LIFE—LIMITING RECOVERY TO AMOUNT OF INTEREST.—The assignee of the payee of a certificate of life insurance has the right to recover the whole amount specified in the certificate, though the debt owed the payee by the person whose life was insured was less than the sum insured: *Wright v. Mutual Ben. etc. Assn.*, 118 N. Y. 237; 16 Am. St. Rep. 749. The assignment of a policy of life insurance as collateral is void beyond the amount of the debt: *Helmetag v. Miller*, 76 Ala. 183; 52 Am. Rep. 316.

AUSTIN v. AUSTIN CITY CEMETERY ASSOCIATION.

[87 TEXAS, 330.]

AN INJUNCTION AGAINST THE ENFORCEMENT OF A VOID MUNICIPAL ORDINANCE should be granted when there is no plain, adequate remedy at law and it is necessary to prevent irreparable injury.

INJUNCTION AGAINST A VOID MUNICIPAL ORDINANCE FORBIDDING, AND MAKING CRIMINAL, INTERMENTS IN A CEMETERY, may be issued by a court of equity.

MUNICIPAL CORPORATIONS. — A POWER TO FORBID THE INTERMENT OF HUMAN BEINGS within specified limits of the city is conferred upon the municipality by a charter authorizing it to regulate the burial of the dead and to purchase, establish, and regulate one or more cemeteries within or without the city limits.

A MUNICIPAL ORDINANCE LIMITING THE PLACES WITHIN A CITY in which it shall be lawful to inter deceased human beings is not void on its face. It is valid unless it unreasonably restricts the rights of its citizens to procure places for that purpose within such limits, and he who claims that it is unreasonable must assume the burden of proving it to be so.

MUNICIPAL ORDINANCES—JURY TRIAL.—If a municipal ordinance is claimed to be void because unreasonable, it is incumbent upon the party making that claim to establish it, and, if the facts are controverted, they must be determined by a jury.

George F. Pendexter, for the appellant.

Clarence H. Miller and Fisher & Townes, for the appellee.

334 **GAINES, C. J.** The court of civil appeals for the third supreme judicial district, in the case above stated, submits the following statement and certifies for our determination the following questions:

“The appellee is a corporation chartered under the laws of this state for the purpose of maintaining a cemetery in the city of Austin, and owning and selling lots therein, for the purpose of the burial of dead human bodies, and that in 1892 it acquired and purchased within said city limits, on the north side of the Colorado river, a tract of land for said cemetery, and that in February, 1893, the city of Austin as a municipal corporation passed the following ordinance:

“‘Be it ordained by the city council of the city of Austin:

“‘**SECTION 1.** That it shall be unlawful for any person to bury, or cause to be buried, or to in any manner aid or assist in the burial of the dead body of any human being, within the corporate limits of the city of Austin, north of the Colorado river, except in the State cemetery, the Mount Calvary cemetery, and the cemetery heretofore established by ordinances of said city, and therein designated as the Austin city cemetery; provided, that the two and one-half acre tract lying on the north of said last-named cemetery, purchased by said city in 1890, shall not be considered as part of said cemetery, and no burials shall be made in said tract.

“‘**SEC. 2.** Any person who shall bury, or cause to be buried, or in any manner aid or assist in the burial of the dead body of a human being, in violation of section 1 of this ordinance, shall be deemed **335** guilty of a misdemeanor, and, on conviction thereof, shall be fined not less than \$50, nor more than \$200.

“‘**SEC. 3.** This ordinance shall take effect and be in force from and after its publication, as required by the charter of the city of Austin.’

“This ordinance was passed by virtue of the following provision of the city charter: ‘To regulate the burial of the dead, and to prohibit public funerals in cases of death from contagious or infectious disease; to purchase, establish, and regulate one or more cemeteries within or without the city limits.’

“The territory within the city limits on the north side of the Colorado river embraces something over 4,500 acres of land, some of which is thickly settled, and some of which is

very sparsely settled. There is territory embraced within the city limits on the south side of the Colorado river that confessedly may be suitable for a cemetery and burial purposes, and in which cemeteries are not prohibited.

"The appellee brought its suit by injunction to restrain the city from enforcing the ordinance set out against its cemetery, and the burial of the dead there, and asks that said ordinance be declared void, on the ground that the charter did not authorize the city to pass such an ordinance; and on the further ground that the same is unreasonable and unjust, and in effect deprives appellee of its property and rights without due process of law."

The questions submitted for our decision under this statement of the case are as follows:

"1. Are the facts that the ordinance set out may be void, and that the city was not immediately seeking to enforce it, and the fact that a legal remedy may exist against its enforcement, sufficient to deny the appellee the remedy by injunction to restrain its execution, and to declare the ordinance void, when the facts in the record show that the right and privilege of using its property for cemetery purposes was destroyed or impaired by virtue of the existence of the ordinance, as no one in the control of dead bodies was willing that they should be buried or interred there for fear of violating the ordinance in question?

"2. Does the provision of the city charter authorize the passage by the city council of the ordinance in question?

"3. If said ordinance was legally passed by virtue of authority of the charter, have the courts the authority to inquire into the reasonableness or unreasonableness of the ordinance?

"4. Is the ordinance in question void on the ground that it is unjust and unreasonable, or that it deprives the appellee of its rights or property without due process of law?

"5. If the ordinance may be unjust or unreasonable, has the trial court the power to so determine, as a matter of law, when there is a jury trial, or should the matter, as a mixed question of law and fact, be left to the determination of the jury?"

226 1. We are of the opinion that if the ordinance in controversy be void, the appellee is entitled to restrain its enforcement by the writ of injunction. It is not to be controverted that, as a general rule, the aid of a court of equity

cannot be invoked to enjoin criminal prosecutions. This rule is, however, subordinate to the general principle that equity will grant relief when there is not a plain, adequate, and complete remedy at law, and when it is necessary to prevent an irreparable injury. Courts of criminal jurisdiction have power to enforce an observance of statutes against crime by visiting upon offenders the penalties affixed for their infraction, and ordinarily no one can call to his aid the powers of a court of equity in order to enforce their observance. Yet it has been held that "the court will interfere to prevent acts amounting to crime if they do not stop at crime, but also go to the destruction or deterioration of the value of property": *Spinning Co. v. Railway*, L. R. 6 Eq. 551. This, however, does not assist us materially in the solution of the present question. It would seem clear that if a party could be enjoined from doing an act not criminal in its nature, which is injurious to the property of another, he could also be enjoined if the act be one made punishable by law as a crime. The punishment of the criminal, when the act committed has injuriously affected the value of the property of another, does not repair the injury. The question under consideration arises upon quite a different case. Here the appellee seeks to enjoin the city of Austin from enforcing an ordinance which it claims to be void, and says that if the enforcement be not restrained it will result in an irreparable injury. In behalf of the city it is answered that if the ordinance be invalid there exists a plain, adequate, and complete remedy at law. It is true that if the ordinance be void any one prosecuted under its provisions may have it so declared, either in the original criminal action or by suing out a writ of habeas corpus. Notwithstanding this fact, it is clear to us, without the statement of the conclusion by the court of civil appeals, that the effect of the ordinance is such that if its enforcement be not restrained it may result in a total destruction of the value of appellee's property for the purpose for which it was acquired. Its provisions are very sweeping, and denounce a penalty against "any person who shall bury, or cause to be buried, or in any manner aid or assist in the burial of the dead body of a human being" contrary to its provisions. No one, we apprehend, without some considerable inducement, will do an act which may cause him to be arrested and prosecuted, however clear he might be in his own mind that the act constituted no violation of the crimi-

nal law. A criminal prosecution is unpleasant to all people who have due respect for the law, and almost necessarily involves inconvenience and expense. As long as the ordinance remains undisturbed it acts *in terrorem*, and practically accomplishes a prohibition against the burial of the dead within the limits ²²⁷ of the city of Austin, save in the excepted localities. Under these conditions, who would venture to bury, or be concerned in burying, a dead body in appellee's ground, or who would purchase a lot in its cemetery? Suppose a city not having the power under its charter to do so should pass an ordinance prohibiting the sale of butcher's meat in a certain locality; and suppose it should also prohibit any one from selling meat to be there sold, or from buying in the prohibited place. The ordinance would be void, but could any one say that the business of a market man in the locality might not be effectually destroyed by it? Under such circumstances we are of opinion he should have the right to proceed against the corporation to enjoin its enforcement. If a penalty was denounced against no one but the market man who should sell, it would seem that his remedy would be to proceed with his business, and defeat any prosecution that should be brought against him for the infraction of the void ordinance. But to deny a remedy in a court of equity in the case first supposed, or in the present case analogous to it, would be, we think, to disregard the fundamental principle upon which such courts are established. We are aware that our conclusion in this case is in conflict with the case of *Wardens v. Washington*, 109 N. C. 21; but it is supported by the case of the *City of Atlanta v. Gate City Gas Light Co.*, 71 Ga. 106, and other authorities. In the latter case the court say: "Where it is manifest that a prosecution and arrest is threatened for an alleged violation of city ordinances for the sole purpose of preventing the exercise of civil rights conferred directly by law, injunction is the proper remedy to prevent injury to the party thus menaced."

2. We are of opinion that the second question should also be answered in the affirmative. To regulate an act implies that the act shall be permitted, but that it may be controlled by reasonable restrictions as to the manner and circumstances of its performance: *People v. Gadway*, 61 Mich. 285; 1 Am. St. Rep. 578; *In re Hauck*, 70 Mich. 396; *Austin v. Murray*, 16 Pick. 121; *Ward v. Waterworks Co.*, L. R. 24 Q. B. Div.

334. The power to regulate, we think, includes not only the power of prescribing the manner in which it shall be done, but may also embrace the time and place of doing it: *In re Wilson*, 32 Minn. 145; *City of Piqua v. Zimmerlin*, 35 Ohio St. 507. We think we may safely say that, as a matter of common knowledge, the mode of the interment of the dead in this state is substantially uniform, and it may be doubted whether there exists any great necessity of restrictions as to the mere mode of burial; while, on the other hand, the location of cemeteries in large cities is a matter of important public concern. It would seem, therefore, that a leading purpose of the provision in the city charter now in question was to empower the city to determine for itself the localities in the city in which the burial of the dead should be permitted.

335 3. It is doubtless within the power of the legislature to make arbitrary laws, provided they neither infringe the constitution of the state nor that of the United States. We are not prepared to say that it could not delegate that power to a municipal corporation. But before it should be held that such grant was intended, it would seem that the language of the charter should be sufficiently explicit clearly to manifest that intention; and, in the absence of such language, we think it should also be held that it was not the intention to confer authority to make an arbitrary and unreasonable law. It occurs to us that it is upon this principle that the courts proceed when they hold, as is generally held, that the ordinance of a municipal corporation must be reasonable. We are therefore of opinion that it was not the intention of the legislature to confer power upon the city council of the city of Austin either to prohibit the burial of the dead within the limits of the city, or to unreasonably restrict the right of its citizens to provide places for that purpose within such limits. In a case like this, whether the ordinance be reasonable or not must depend upon the circumstances of the particular restriction as affecting the people who are to be subjected to its control. When the facts are determined, we think the question of the reasonableness of the ordinance is one of law which must be decided by the court.

4. The ordinance in question is not void upon its face; nor can we say that it can be declared void, in view of the meager statement of facts submitted with the question. The presumption is that the ordinance is valid. The mere fact

that but three cemeteries are designated in which dead bodies of people can be buried, and the further fact that the city limits north of the river embrace about 4,500 acres of land, do not of themselves show an unreasonable restriction upon the right of burial. There may be ample facilities conveniently accessible south of the river. We do not know judicially whether the river is fordable or not, or whether or not it is spanned by bridges. Nor can we say that there are not convenient localities outside of the city limits which may be made available for cemetery purposes. If the ordinance be reasonable, it does not deprive appellee of its property without due process of law.

5. In reply to the last question we have to say that, when an ordinance like the one in question is attacked upon the ground that it is unreasonable and therefore void, it is incumbent upon the party who alleges its invalidity to aver and prove the facts which made it so. If the facts be controverted they must be determined by the jury: *Clason v. Milwaukee*, 30 Wis. 316. But whether the facts relied upon show the ordinance to be unreasonable or not is a question for the court.

INJUNCTIONS AGAINST MUNICIPAL ORDINANCES.—An injunction lies to restrain the enforcement of municipal ordinances, admitted to be invalid, the execution of which injuriously affects private rights: *Deems v. Mayor*, 80 Md. 164; 45 Am. St. Rep. 339, and note.

MUNICIPAL CORPORATIONS—POWER TO REGULATE BURIALS.—Within the limits of a municipal corporation the burial and interment of the dead is an appropriate subject of regulation by ordinance: Extended note to *Robinson v. Mayor*, 34 Am. Dec. 636.

MUNICIPAL CORPORATIONS.—ONE WHO ATTACKS MUNICIPAL ORDINANCES AS UNCONSTITUTIONAL and illegal must plead and show with particularity in what respect they are illegal and unconstitutional: *State v. Fourcade*, 45 La. Ann. 717; 40 Am. St. Rep. 249.

BILLS v. HIBERNIA INSURANCE COMPANY.

[37 TEXAS, 547.]

INSURANCE, ENTIRETY OF CONTRACT FOR.—If a building and certain articles of personalty therein are separately valued and insured for specific sums, and the premium paid for the insurance is a gross sum, and the policy contains a condition that “this entire policy shall be void if the subject of insurance be a building on ground not owned by the assured in fee simple,” and the building so insured is not so owned, the policy, being indivisible, is wholly void, and no recovery may be had for the personal property insured.

McKie & Autrey, for the plaintiff in error.

Leake, Shepard & Miller, and Barry & Etheridge, for the defendant in error.

550 **BROWN, A. J.** The Hibernia Insurance Company issued to R. D. Bills, upon his gin house and machinery, a policy of fire insurance in the sum of fourteen hundred and thirty dollars, the gin house being specified in the face of the policy as insured in the sum of three hundred and seventy dollars, and the other items of property separately valued at different amounts, making the total amount of insurance. The premium for the whole was the sum of one hundred and fourteen dollars and forty cents. All the property was situated in and connected with the gin house, so as to be subject to destruction by the same fire. The gin house was situated upon a tract of land leased by Bills. The policy contained the following clause: “This entire policy . . . shall be void . . . if the subject of insurance be a building on ground not owned by the insured in fee simple.”

The building and all the personal property were destroyed by fire, and suit was instituted upon the policy. Defendant pleaded the above condition of the policy, and alleged that the building was upon ground not owned by Bills in fee simple, and therefore the policy was void as to the whole. It was admitted that the gin house was on leased ground, and plaintiff's counsel conceded that he could not recover for the gin house, but claimed that the policy was valid as to the other property.

Upon trial the plaintiff recovered for all except the gin house, from which judgment the defendant appealed, and the court of civil appeals reversed the judgment of the district court and remanded the case to the district court, with instructions to enter judgment for the plaintiff Bill for one

hundred and fourteen dollars and forty cents, the amount of premium paid.

The policy of insurance upon which this suit was instituted was evidently prepared by filling in the blanks in a form intended to embrace a house or personal property, or both, and contains clauses applicable to the two, also such as are applicable to each class of property separately.

The property insured consisted of a gin house valued at three hundred and seventy dollars, and machinery and other things situated in the house, each item valued separately, aggregating the sum of fourteen hundred and thirty dollars, the premium being a gross sum of one hundred and fourteen dollars and forty cents.

Three assignments of error were presented to the court of civil appeals; all, however, stating in different forms the proposition that the policy sued upon was rendered entirely void by the fact that the gin house was upon land not owned by the assured in fee simple. Fraud in the application for the insurance is not presented in these assignments, and therefore will not be considered by this court.

The question to be decided arises upon the following language used in the policy: "This entire policy shall be void if the subject of ⁵⁵¹ insurance be a building on ground not owned by the insured in fee simple. We have inserted the language as it would read in its application to this question, omitting intervening words not applicable.

It is claimed on the part of the plaintiff that this policy is a divisible contract, and that it may be void as to the building and valid as to the other property insured. On the other hand, the defendant claims that it is an entire contract, and is void in all its parts, if void at all. It is unnecessary to enter into a discussion of the rules which govern in determining whether a policy of insurance upon different articles separately valued is to be held entire or not. There is much division among the courts upon the question. It would indeed be difficult to decide as to which has the greater number of cases in its support, and sound reasons can be given in support of each side of the controversy. The language in this policy, however, is so definite upon the subject that there is no room for construction. The insurance company selected the words in which to express the terms and conditions upon which the forfeiture could be enforced, and must abide by the effect to which they are entitled under the established

rules of construction; and the plaintiff accepted the policy, and is equally bound by them under the law applicable to his rights.

The terms being that the policy shall be entirely void upon a certain state of case, it cannot become void in part in that event. A contract cannot be entirely void and at the same time partially valid. Entirely void means void *in toto*, in all its parts, and as to all rights claimed under it. We agree with counsel for defendant that the contract is entire, and that, if the facts bring the case within the language of the clause expressing the conditions of forfeiture, it is void as to all the property embraced. Plaintiff has yielded his claim as to the gin house, and we shall not discuss the effect upon that except in so far as it is involved in the construction of the words used.

The language was selected by the defendant to express the terms of forfeiture imposed by it, and language will be strictly construed against it for that, and for the additional reason that forfeitures are not favored and will not be declared unless the case comes within the terms prescribed: *Goddard v. East Texas etc. Ins. Co.*, 67 Tex. 71; 60 Am. Rep. 1; Wood on Fire Insurance, sec. 60, p. 161; *Equitable Life Ins. Co. v. Hazlewood*, 75 Tex. 347; 16 Am. St. Rep. 893. In order for the clause of forfeiture to be given effect it must clearly embrace the case made by the facts: *Boon v. Aetna Ins. Co.*, 40 Conn. 575; *Commercial Ins. Co. v. Robinson*, 64 Ill. 265; 16 Am. Rep. 557. In the case last cited the policy provided that the company should not be liable if the loss was occasioned by the explosion of certain things mentioned therein. There was an explosion of one of the kinds of explosives mentioned in a different building, that set the fire, which fire was communicated to the property covered by the policy, and the loss occurred by fire thus caused by an explosion. The court held, that this was not within the language of the ⁵⁵² contract, and the exemption from liability did not exist. In the other case, *Boon v. Aetna Ins. Co.*, 40 Conn. 575, the policy provided that the company should not be liable for any loss or damage "by fire which may happen or take place by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power." The property was situated in a town in Missouri which was occupied by the federal troops, during the late war, and a superior force of confederate troops attacked the town, when the commander

of the United States troops, in order to prevent the stores falling into the hands of the confederates, set fire to the building in which such stores were, from which the fire spread and consumed the property insured. The court held that this did not exempt the company, because it did not fall within the terms of the policy.

If the conditions or warranties be repugnant to the portions of the policy describing the subject of insurance, the condition must yield to that portion which expresses the terms of liability; as if, for instance, the body of the policy grants insurance upon a stock such as is usually carried in a "country store," or such as is usually carried in a "retail store," and in the conditions prescribing that the carrying in the stock certain articles named as extra hazardous will cause a forfeiture of the policy, and it appears from the evidence that the articles expressly named are usually carried in such stocks and embraced in the terms of the policy describing the subject, the clause of forfeiture must yield to the language of the body of the policy, and the forfeiture will not be enforced: Wood on Insurance, sec. 64, p. 169; *Pindar v. Kings County Ins. Co.*, 36 N. Y. 648; 93 Am. Dec. 544; *Whitmarsh v. Conway etc. Co.*, 16 Gray, 359; 77 Am. Dec. 414.

The authorities suffice to illustrate the rule, that the terms of the policy must be broad enough to cover, under a strict construction, the facts of the case under consideration, and that every doubt arising upon the terms of the incident must be resolved against the insurer. With this rule in view, we will examine the case now before the court upon this point.

"The subject of the insurance" in this policy was the property insured. This consisted of a building and various other articles of personal property separately valued. In order to sustain the contention of the defendant, we must import into the clause of forfeiture words to give to it the effect as if it read thus: "If the subject of insurance or any part of it be a building," etc., as in the case of *Smith v. Agricultural Ins. Co.*, 118 N. Y. 526. The court, however, will not imply anything in favor of a forfeiture, but must try the matter by the language used by the parties.

"The subject of insurance," as used in the condition of forfeiture, means a definite single subject, that is, a house, one house, and not a house and other property. If we consider all of the insured property (consisting of a house and many pieces of machinery) as constituting ⁵⁵² the subject,

then the subject was not a house, and the facts do not fall within the terms of the contract. If we consider each piece of property as a separate subject of insurance, then the house was not the subject, but one of the subjects, and in either case the facts proved do not establish the contingency upon the happening of which the policy is to be entirely void.

The court of civil appeals erred in reversing the judgment of the district court and rendering judgment for the defendant, for which error the judgment of the court of civil appeals is reversed and the judgment of the district court is affirmed,

INSURANCE—ENTIRETY OF CONTRACT FOR, ON DIFFERENT KINDS OF PROPERTY.—A contract of insurance on two or more kinds of property which are specifically appraised and valued in the policy, will be deemed severable and not entire unless there is something in the terms or nature of the particular contract, or in the circumstances of the case, or in the nature of the different subjects of insurance, from which it may be inferred that the insured would not have been likely to have assumed the risk on one of several of them unless induced by the advantage and profit of having a risk on all: *Coleman v. Insurance Co.*, 49 Ohio St. 310; 34 Am. St. Rep. 565, and note, with the cases collected. See, also, the note to *Pioneer Mfg. Co. v. Phoenix Assur. Co.*, 28 Am. St. Rep. 677.

GULF, COLORADO & SANTA FE RY. CO. v. PENDRY.

[87 TEXAS, 552.]

NEGLIGENCE, CONTRIBUTORY. — THE NEGLIGENCE OF THE DRIVER OF A STREET CAR IS NOT IMPUTABLE to a passenger therein.

NEGLIGENCE.—CONTRIBUTORY NEGLIGENCE IS NOT IMPUTABLE TO A PERSON riding as a passenger in a street car from the mere fact that while so riding he did not exercise any care to discover an approaching railway train.

JURY TRIAL—NEGLIGENCE—INVADING THE PROVINCE OF THE JURY.—In an action to recover for injuries received by a person while riding as a passenger in a street car from its collision with a railway train, the court should not instruct the jury that if, in approaching the crossing of the street over which the street car was being operated, the servants of the railway corporation did not keep a lookout for the cars and other vehicles, or were running the train at a greater rate of speed than allowed by an ordinance of the city, and if the collision resulted from, and would not have occurred but for, such negligence, the jury should find for the plaintiff. Whether the conduct of the servants of the defendant constituted negligence is a question of fact for the jury.

Alexander & Clark, and J. W. Terry, for the plaintiff in error.

Wynne & McCart, for the defendant in error.

555 DENMAN, A. J. April 10, 1889, Mrs. Pendry, wife of E. C. Pendry, was a passenger on one of the street cars of the Fort Worth Street Railway Company, traveling along Belknap street, of said city, in the direction of the intersection of said street with the track of the Gulf, Colorado & Santa Fe Railway Company, and at the same time a train of flat cars was, by one of the engines of said railroad company, being backed over its said track toward said intersection. A collision ensued, in which Mrs. Pendry was injured; and this suit was brought by her husband, E. C. Pendry, against both of said companies, to recover damages therefor.

There was much conflict in the testimony as to the rate of speed said car and train were respectively traveling at and immediately before the collision, and as to when each became visible to the servants operating the other just before the collision, on account of fences and houses, and a curve and cut along and through which the train approached the intersection, and as to the distance each was from the intersection when the servants of the other discovered its approach.

556 The undisputed evidence shows that Mrs. Pendry, immediately before and at the time of the collision, was sitting in the street car with her back to the approaching train, and was not aware of its presence until the moment of the collision, when the frightened appearance of a passenger in front of her caused her to turn and look, and she discovered the train and rose to her feet as the collision occurred.

Upon the verdict of the jury the court below rendered, and the court of civil appeals affirmed, a judgment in favor of E. C. Pendry against the railroad company for six thousand five hundred dollars, and against said Pendry as to the street car company. The Gulf, Colorado & Santa Fe Railway Company, plaintiff in error, has brought the case to this court by writ of error. It is urged, that the trial court erred in not submitting the issue of contributory negligence on the part of Mrs. Pendry.

In this case the burden of proof was upon defendant to establish by evidence its defense of contributory negligence on the part of Mrs. Pendry. In order to do so, it would have been necessary to show, that at the time of or immediately before the collision she failed to use such care and caution as a reasonably prudent person would have used under like circumstances to avoid the injury, and that such failure was one of the proximate causes of the injury. If it be conceded

that the driver of the car was negligent, that fact would not tend to support such defense, for his negligence would not be imputed to her.

In the absence of some circumstance warning her of approaching danger, we are of the opinion that the jury could not properly have found her guilty of contributory negligence from the mere fact that it was not shown that she, while a passenger on a public conveyance, exercised any care to discover the approaching train. The court did not err in not submitting to the jury the issue of contributory negligence.

The giving of the following charge is assigned as error: "If you believe from the evidence that the agents or servants of the defendant, the Gulf, Colorado & Santa Fe Railway Company, in charge of and operating the train which it is alleged collided with the street car upon which plaintiff's wife was a passenger, in approaching the crossing of the street over which said street car was being operated, failed to keep a proper lookout for cars or other vehicles which might be approaching the crossing, or that such agents or servants of said railway company were running said train at a greater rate of speed than allowed by the ordinances of said city; and if you further believe from the evidence that the collision with said street car resulted from such negligence on the part of the said agents or employees of the Gulf-Colorado & Santa Fe Railway Company, and that the collision would not have occurred but for such negligence on the part of said employees, ⁵⁵⁷ you should find for the plaintiff as against the said defendant, the Gulf, Colorado & Santa Fe Railway Company."

This charge declares, as a matter of law, that the failure of the servants of the railway to keep a proper lookout for cars which might be approaching the crossing was negligence. It may be that from such failure the jury would have been justified in inferring negligence as a fact. It was, however, a question of fact to be found or inferred by the jury, and the court invaded the province of the jury in instructing them that such failure was negligence: *Missouri Pac. Ry. Co. v. Lee*, 70 Tex. 497; *Galveston etc. Ry. Co. v. Ryon*, 80 Tex. 59; *Texas & Pac. Ry. Co. v. Murphy*, 46 Tex. 364; 26 Am. Rep. 272.

The judgment is affirmed as to the street car company, and reversed and cause remanded as between plaintiff and Gulf, Colorado, and Santa Fe Railway Company.

NEGLIGENCE—IMPUTED.—It is the generally accepted doctrine of the courts of this country that the contributory negligence of a carrier, or the driver of a public or private vehicle not owned or controlled by the passenger, and who is himself without fault, will not constitute a bar to the right of the passenger to recover for injuries received: *Baltimore etc. R. R. Co. v. State*, 79 Md. 335; *post*, p. 000, and *note*.

BENSON v. PHIPPS.

[87 TEXAS, 578.]

PRINCIPAL AND SURETY—EXTENSION OF TIME.—A contract between a debtor and creditor that the time for paying the debt shall be extended one year, and the former shall forego his right to payment before the expiration of that time, and will pay interest, is a contract having consideration sufficient to enforce it, and therefore releases the surety of the debtor.

George C. Altgelt, for the plaintiff in error.

J. D. Crenshaw, for the defendant in error.

579 GAINES, B. J. The plaintiff was a surety for one Hosack, the principal maker upon a promissory note payable to the defendant in error. Some days after the note fell due, Hosack wrote defendant in error requesting an extension, to which request defendant replied by letter as follows: "I will extend the time of payment one year, and look with confidence for the accrued interest within sixty days, hoping it will not inconvenience you. After that, if it is your pleasure to make the interest on the extension payable semi-annually, it will help me."

The defendant in error testified to having received the letter from Hosack requesting an extension, and that the foregoing was his reply, but the contents of Hosack's communication were not otherwise shown. He also testified that he was paid nothing for the extension, and that Hosack never paid the accrued interest.

Suit having been brought on the note by the payee against all the makers, the plaintiff in error pleaded his suretyship; and the facts as stated above having been proved, the trial court gave judgment for the plaintiff in that court. That judgment upon appeal was affirmed by the court of civil appeals.

It is the right of the surety at any time after the maturity of the debt to pay it and to proceed against the principal for

indemnity. This right is impaired if the creditor enter into a valid contract with the principal for an extension of the time of payment. The obligation of the surety is strictly limited to the terms of his contract, and any valid agreement between the creditor and the principal by which his position is changed for the worse, discharges his liability. For this reason ⁵⁸⁰ it is universally held that a contract between the two, which is binding in law, by which the principal secures an extension of time, releases the surety, provided the surety has not become privy to the transaction by consenting thereto. If the creditor is not bound by his promise to extend it is clear there is no release. In order to hold him bound by his promise there must be a consideration. Whether a mere agreement for an extension by the debtor is sufficient to support a promise to extend by the creditor is a question upon which the authorities are not in accord. We are of opinion, however, that the question should be resolved in the affirmative, at least in cases in which it is contemplated by the contract that the debt should bear interest during the time for which it is extended. If the new agreement was that the debtor should pay at the end of the period agreed upon for the extension precisely the same sum which was due at the time the agreement was entered into, the case might be different. But a promise to do what one is not bound to do, or to forbear what one is not bound to forbear, is a good consideration for a contract. In case of a debt which bears interest either by convention or by operation of law, when an extension for a definite period is agreed upon by the parties thereto, the contract is that the creditor will forbear suit during the time of the extension, and the debtor foregoes his right to pay the debt before the end of that time. The latter secures the benefit of the forbearance; the former secures an interest-bearing investment for a definite period of time. One gives up his right to sue for a period in consideration of a promise to pay interest during the whole of the time; the other relinquishes his right to pay during the same period, in consideration of the promise of forbearance. To the question why this is not a contract, we think no satisfactory answer can be given. It seems to us it would be a binding contract, even if the agreement was that the debt should be extended at a reduced rate of interest. That an agreement by the debtor and creditor for an extension for a definite time, the debt to bear interest at the same rate, or at an increased but not usurious

rate, is binding upon both, is held in many cases, some of which we here cite: *Wood v. Newkirk*, 15 Ohio St. 295; *Fowler v. Brooks*, 13 N. H. 240; *Davis v. Lane*, 10 N. H. 156; *Stallings v. Johnson*, 27 Ga. 564; *Robinson v. Miller*, 2 Bush. 179; *Reynolds v. Barnard*, 36 Ill. App. 218; *Chute v. Pattee*, 87 Me. 102; *Rees v. Barrington*, 2 Ves. 540; see, also, *Crossman v. Woehleben*, 90 Ill. 537; *McComb v. Kittridge*, 14 Ohio, 348.

In many cases which seemingly support the contrary doctrine there was a mere promise by the creditor to forbear, without any corresponding promise on part of the debtor not to pay during the time of the promised forbearance. In such cases it is clear that there is no consideration for the promise. In others, where was a mutual agreement for the extension, it may be that interest during the period of ⁵⁸¹ extension was not allowed by law, and the agreement did not provide for the payment of interest. The case of *McLemore v. Powell*, 12 Wheat. 554, may have been of that character.

In this case, as we construe the correspondence between Hosack and the defendant in error, there was a request for an extension of the debt for twelve months on part of the former, and an unconditional acceptance on part of the latter. We infer, that Hosack must have written something about the payment of accrued interest — probably that he hoped to be able to pay it in sixty days. The presumption is, that the letter was in the possession of the defendant in error at the time of the trial. He did not produce it. In any event, he should have known its contents, and if Hosack made his request for an extension conditional upon his payment of the accrued interest, he should have testified to the fact. We conclude, therefore, that there was a binding promise for an extension, and that the plaintiff in error was therefore released.

Upon a careful examination of our own reports we have found no decision of our court which is in conflict with the opinion herein expressed. There are a few cases which seem not to be in accord with our conclusions, but we think the conflict is only apparent. In *Gibson v. Irby*, 17 Tex. 173, the maker of the note sued on pleaded that the payee had promised him that the note should not be due and payable until the defendant had time to gather his crop, on condition that the defendant would then promptly pay the money and interest. The supreme court affirmed the ruling of the trial

court in sustaining an exception to the plea, upon the ground that the plea showed no consideration for the promise. This ruling was correct, but if it had been pleaded affirmatively that the defendant had promised the payee that he would not claim the right to pay the debt before his crop was gathered, we think the plea would have been good.

In *Claiborne v. Birge*, 42 Tex. 98, Burge was the surety of one Urqhart upon three promissory notes which fell due at different dates. After two of them had matured, Urqhart executed a written promise to the holder "to pay 2 per cent. per month interest on the . . . notes after maturity of the same." The evidence failed to show that the holder agreed to give an extension. It was held, that Urqhart's promise was void, and that the surety was not released. There are some expressions in the opinion in that case which do not accord with our views, but which were not necessary to its decision.

In *Payne v. Powell*, 14 Tex. 600, it is held that an agreement to extend in consideration of a promise to pay usurious interest is not binding upon the debtor, and therefore is not binding on the creditor, and that accordingly the surety was not released. On the other hand, it is determined in *Knapp v. Mills*, 20 Tex. 123, that an agreement ⁵⁸² to pay interest at an increased rate, which is not usurious, is sufficient to support a contract for an extension.

There is error in the judgment, for which it must be reversed; and since it may be shown upon another trial that Hosack's offer contained a condition that he would pay the interest in sixty days, the cause is remanded.

SURETYSHIP—CONTRACT DISCHARGING SURETY.—An agreement entered into between the payee and the principal debtor in a note without the consent of the surety, by which the time for its payment is extended upon the payment of interest thereon semi-annually, instead of annually as stipulated for in the note, is based upon a sufficient consideration, and so changes the contract of suretyship as to discharge the surety: *Scott v. Fisher*, 110 N. C. 311; 28 Am. St. Rep. 688, and note; but a mere indulgence by a creditor or employer to the principal in a contract, or a new agreement to give him further time to pay his debt or make good a default, if not supported by any new consideration, does not discharge the sureties on the original contract: *Saint v. Wheeler etc. Mfg. Co.*, 95 Ala. 362; 36 Am. St. Rep. 210, and note. See further the note to *Thorn v. Pinkham*, 30 Am. St. Rep. 338.

CASES
IN THE
SUPREME COURT
OF
GEORGIA.

MAYOR v. SIKES.

[94 GEORGIA, 80.]

WATERCOURSES—SURFACE WATERS.—AT COMMON LAW surface water, like the waters of the sea, was regarded as a common enemy, and any landowner had the right to expel it from his own land without regard to the injury thereby occasioned to another proprietor.

WATERCOURSES—SURFACE WATERS.—UNDER THE CIVIL LAW, while the lower proprietor is bound to receive the surface water which naturally flows from the estate above, the owner of the latter has no right, by diverting surface water which he ought to receive from an estate above his own and to which his estate is servient, thus to relieve his own estate of the servitude which nature placed upon it, and cast the whole burden upon the estate of his neighbor below.

WATERCOURSES—SURFACE WATERS.—One landed proprietor has no right to concentrate and collect surface water, and thus cause it to be discharged upon the land of a lower proprietor in greater quantities at a particular locality, or in a manner different from that in which the water would be received by the lower estate if it simply ran down upon it from the upper by the law of gravitation.

MUNICIPAL CORPORATIONS—DIVERSION OF SURFACE WATER.—Under a constitutional provision providing that private property shall not be taken or “damaged” without compensation being first paid, a municipal corporation which, in the exercise of a statutory power authorizing it to erect and maintain waterworks, interrupts the natural flow of surface water, and causes it to flow in increased quantity upon a lower lot-owner’s land, thereby diminishing its market value, must make compensation for the damage occasioned by the increased flow.

NEW TRIAL—EXCESSIVE VERDICT—CONFLICTING EVIDENCE.—If a verdict ought not to be sustained because it is excessive, a new trial should be granted unconditionally where the evidence was so conflicting as not to warrant any fixed and absolute conclusions upon the questions involved. It is error to make it conditional upon reducing the amount.

ACTION for damages.

Wooten & Wooten, for the plaintiff in error.

W. T. Jones and S. J. Jones, for the defendant in error.

³¹ LUMPKIN, J. 1. Before the ratification of the present constitution of this state, the owner of private property actually taken for public use was undoubtedly entitled to compensation; but where such property was merely damaged in the prosecution of a public work, it was *damnum absque injuria*. Our constitution now provides that "Private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid": Code, sec. 5024; Const., art. 1, sec. 3, par. 1. It follows that where a municipal corporation, in the exercise of a statutory power authorizing it to erect and maintain city water-works, in so doing injures or damages the private property of a citizen, that corporation will be liable to make compensation in damages if an individual would be liable for causing injuries or damages of the same kind. In connection with all that is said above, see *Smith v. Floyd County*, 85 Ga. 420.

Construing so much of the declaration as was left after a portion of it had been stricken on demurrer, together with the evidence offered by the plaintiff in support of her cause of action, the main question presented for our consideration is, Can she recover from the mayor and council of Albany compensation for arresting or obstructing the natural flowage of surface water and causing it to flow upon her land, thereby diminishing the market value of her property? The evidence ³² tends to show that before the erection of the city water-works, the lot upon which the reservoir now stands was more elevated than that of the plaintiff, and that consequently rain-water falling upon the upper lot ran down upon the lot of the plaintiff; but that since the erection of the water-works rain-water which fell upon other land, and ran upon and was more or less absorbed by the present city lot, has been diverted from it and caused to overflow the plaintiff's lot, so that it now receives a much greater quantity of surface water than it did before. Whether the city is liable for this increased flowage of surface water upon the plaintiff's land depends upon whether or not we adopt what is known as the "common-law rule," or the "civil-law rule," bearing upon the subject of surface water.

According to the rule of the common law, surface water, like the waters of the sea, was regarded as a common enemy,

and it was the right of any landowner to expel it from his own land without regard to the injury which might thereby be occasioned the proprietor of a lower estate. By the rule of the civil law, while the lower proprietor is bound to receive the surface water which naturally flows from the estate above, the owner of the latter has no right, by diverting surface water which he ought to receive from an estate above his own and to which his estate is servient, thus to relieve his own estate of the servitude which nature placed upon it, and cast the whole burden upon the estate of his neighbor below. It is not our present purpose to discuss at length the merits of these two conflicting rules. They have been stated and discussed by numerous judges in many of the courts of this country, and anyone desiring to pursue the investigation will find the sources of information indicated in the authorities below cited. According to Gould, the rule of the common law has been accepted in Massachusetts, Maine, Vermont, ²² New York, New Hampshire, Rhode Island, New Jersey, Michigan, Minnesota, and Wisconsin; that of the civil law in Pennsylvania, Illinois, North Carolina, Alabama, Tennessee, California, and Louisiana, and has been referred to with approval by the courts of Ohio and Missouri: Gould on Waters, 2d ed., secs. 265, 266. Perhaps a majority of the American states have adopted the civil law rule. In *O'Connell v. East Tennessee etc. Ry. Co.*, 87 Ga. 246, 27 Am. St. Rep. 246, many of the cases bearing upon this question are referred to. This case is also reported and annotated in 18 Law Reports Annotated, 394, and in the notes a large number of pertinent cases may be found cited. See, also, Washburn on Easements and Servitudes, 4th ed. 23, 485, et seq.; Moak's Underhill on Torts, 457-478, 712-714; *Martin v. Jett*, 12 La. 501; 32 Am. Dec. 120. An examination of the cases of *Ogburn v. Connor*, 46 Cal. 346, 13 Am. Rep. 213, and *McDaniel v. Cummings*, 83 Cal. 515, will show that the supreme court of that state, while endeavoring in the former case to state the common-law rule, really stated the rule of the Roman civil law; and in the latter case, notwithstanding the error thus committed, allowed the civil-law rule to prevail on the doctrine of *stare decisis*. In *Livingston v. McDonald*, 21 Iowa, 160, 89 Am. Dec. 563, that eminent jurist, Judge Dillon, said, in discussing a similar question then involved, that "It would be inexcusable to overlook the doctrines of the civil law respecting it. That law, embodying the accumu-

lated wisdom and experience of the refined and cultivated Roman people for over a thousand years, though not binding as authority, is often of great service to the inquirer after the principles of natural justice and right." In the note to *Martin v. Jett*, found in 32 Am. Dec. 120, the common-law rule is spoken of as the law of force, and the civil-law rule as the law of justice. We concur in this view, and for this reason have followed the latter rule.

²⁴ Our only reason for doubting which rule we ought to follow is the fact that so much of the common law of England as was in force in the province of Georgia prior to May 14, 1776, and which was then applicable to the condition and habits of our people and consonant with our form of government, is still, except in so far as the same has been expressly repealed, modified, or superseded, a part of the law of this state; and therefore we were not quite certain that the rule in question is not binding upon us as a portion of our system of laws derived from the mother country. After a careful, diligent, and somewhat extensive, though not completely exhaustive, search among the old English reports and law-writers, we have been unable to find any distinct, clear, and definite statement of what was, at the time above mentioned, the common law applicable to the precise question involved in the present case. We are, perhaps, perfectly safe in saying that there was not in England, prior to the beginning of the American Revolution, any such authoritative announcement, judicial or otherwise, of the rule concerning surface waters now insisted upon by counsel for the plaintiff in error, as to make the same binding upon us. If there was then such a rule at common law, it certainly has never yet been established and recognized in Georgia, and we doubt exceedingly if it would be applicable to the condition and habits of our people, or adapted to the true spirit and genius of our institutions. Our declared constitutional policy, as already shown, is to require compensation to be made for injuries inflicted. The growth of this policy is evidenced by the trend of our legislation for many years, and the corresponding modification of judicial opinion. In view of these things we do not care now to turn backward, and there is nothing, we think, which prevents our following as the true law of this state the rule of the civil law, it being, of the two, ²⁵ the sounder, the more consistent with natural justice and right, and the more in harmony

with our system of law and the general conditions of the commonwealth of this state.

In the case of *Phinizy v. City Council of Augusta*, 47 Ga. 260, the plaintiff alleged that the city had injured his land by introducing within the corporate limits, by means of a canal, water for manufacturing purposes, and then turning this water into artificial drains so as to increase the amount of water flowing upon his land; and it was held that the city was liable. The question as to the liability of the city for causing surface or rain water to be thrown, through these drains, in a concentrated stream upon the land of the plaintiff, was also, to some extent, involved in the case. There seems to have been a difference of opinion as to the law relating to surface water, between Judges McCay and Montgomery on the one side, and Chief Justice Warner on the other. We are decidedly of the opinion that the views entertained by the latter were correct. Indeed, most of the authorities follow the doctrine that, even as to surface water, one landed proprietor has no right to concentrate and collect it, and thus cause it to be discharged upon the land of a lower proprietor in greater quantities at a particular locality, or in a manner different from that in which the water would be received by the lower estate if it simply ran down upon it from the upper by the law of gravitation. The case of *Goldsmith v. Elsas*, 53 Ga. 186, is not precisely in point for our present purpose, but it recognizes the rule that the lower of two city lots owes a servitude to the higher, so far as to receive the water which naturally flows therefrom, but the owner of the higher lot has no right to increase such flow by artificial means.

We wish to be understood as ruling in the present case that the only compensation to which the plaintiff ³⁶ would be entitled under the circumstances, is for the damage (if any) arising from the alleged increased flow of surface water to which the defendant has subjected her lot, and the consequent diminution of the market value of the same. If we correctly understand the case as presented, such is, indeed, the only compensation which the plaintiff seeks to recover.

2. The jury found for the plaintiff the sum of fifteen hundred dollars. The court ordered that a new trial be granted, unless, by writing off, the recovery be reduced to three hundred dollars. There was a decided conflict in the evidence as to whether the depreciation in the value of the plaintiff's

property was occasioned by any increased flooding resulting from the erection of the water-works; and if so, to what sum the depreciation from this cause amounted. The evidence did not, in any view, warrant any fixed and absolute conclusions upon these questions, but left the proper determination of them in such uncertainty that the solution of them was peculiarly a matter for the jury, and not one for the judge. It is evident that the judge was dissatisfied with the finding of fifteen hundred dollars, and that he would not in any event have permitted a recovery for this amount to stand. Upon the question of granting or refusing a new trial without condition or qualification, he undoubtedly would have set the verdict aside. The granting of a new trial generally would have met the full approval of this court; and looking at the verdict rendered as one which ought not to be sustained, as the court below evidently did, we think, under the circumstances, a new trial should have been granted absolutely and without condition.

This case, as to the point now under consideration, is not like that of the *Augusta Ry. Co. v. Grover*, 92 Ga. 134. There the value of a life was involved, and it was capable of being ascertained with some degree of certainty. It could, at least, be ³⁷ shown that, under the evidence most favorable to the plaintiff, a verdict beyond a certain amount would be necessarily excessive. The ruling in that case was simply to the effect that if the plaintiff, by writing off, voluntarily relinquished all of the recovery which could certainly be treated as excessive, the amount of the verdict, after this was done, would no longer be a cause for a new trial.

Judgment reversed.

WATERS AND WATERCOURSES—SURFACE WATERS—MUNICIPAL CORPORATIONS.—A party has no right to collect surface water and discharge it on the land of another, to his damage, and if he does so, he will be liable for the damage sustained: *Fremont etc. R. R. Co. v. Marley*, 25 Neb. 138; 13 Am. St. Rep. 482, and note; *Patoka Tp. v. Hopkins*, 131 Ind. 142; 31 Am. St. Rep. 417, and note; *Meixell v. Morgan*, 149 Pa. St. 415; 34 Am. St. Rep. 614. A city is so liable: *Rychlicki v. City of St. Louis*, 98 Mo. 497; 14 Am. St. Rep. 651, and note; *Patoka Tp. v. Hopkins*, 131 Ind. 142; 31 Am. St. Rep. 417, and note. A municipal corporation must respond in damages for its negligence in the construction or repair of public works when special injury results to a private person therefrom: *Krug v. St. Mary's Borough*, 152 Pa. St. 30; 34 Am. St. Rep. 616. It cannot, in the construction of such works, divert the flow of surface water, or gather it in volume and force, and empty it upon private property, without becoming liable therefor: See monographic note to *Chalkley v. City of Richmond*, 29 Am. St. Rep. 743, on

liability of municipal corporations for defects in, and want of repair of, sewers; but compare monographic note to *Goddard v. Inhabitants of Harpswell*, 30 Am. St. Rep. 400, on the liability of cities for the negligence and other misconduct of their officers and agents.

EMINENT DOMAIN—TERM “DAMAGED,” MEANING OF.—To deprive one of the ordinary beneficial use and enjoyment of his property is, in law, equivalent to the “taking” of it, and is as much a “taking” as though the property itself were actually taken: See monographic note to *Vanderlip v. City of Grand Rapids*, 16 Am. St. Rep. 610, on what is a taking of property for public use. The word “damaged,” as used in the constitution, includes all actual damages resulting from the exercise of the right of eminent domain which diminish the market value of private property; and this applies to damages caused by a city in the construction of a public improvement: *City of Omaha v. Kramer*, 25 Neb. 489; 13 Am. St. Rep. 504.

NEW TRIAL—REMITTING EXCESS—CONFLICT OF EVIDENCE.—A new trial should be granted where the verdict is against the weight of evidence, and manifestly wrong: *New Orleans etc. R. R. Co. v. Statham*, 42 Miss. 607; 97 Am. Dec. 478, and note; *Pursley v. Hayes*, 22 Iowa, 11; 92 Am. Dec. 350, and note. If damages appear to the trial judge to be excessive, he may either grant a new trial absolutely, or, in his discretion, give the plaintiff the option to remit the excess, or a portion thereof, and order the verdict to stand for the residue, and no exception lies to his action: *Doyle v. Dixon*, 97 Mass. 208; 93 Am. Dec. 80.

STATE v. BROBSTON.

[94 GEORGIA, 95.]

SETOFF—INSOLVENT BANK—DEPOSITORS.—If a bank becomes insolvent and its effects are put into the hands of a receiver, its depositors indebted to it by promissory notes may set off against such notes in the hands of the receiver the amounts due them on their deposits.

BANKS—INSOLVENCY—ASSETS—STATE LIEN.—PROMISSORY NOTES held by an insolvent bank against depositors are assets of the bank only as to the balances due after deducting the deposits. Hence, if a bank, being a state depository, becomes insolvent while indebted to the state, and its effects are put into the hands of a receiver, the lien of the state can attach only to such balances.

SETOFF—RECEIVER OF INSOLVENT BANK.—Although the receiver of an insolvent bank has obtained an order of court directing him to allow set-offs in settling the claims of interested parties, he will act at his peril concerning the existence and rightfulness of any demand he may allow as a setoff, where the record does not show what claims of setoff should be allowed.

PETITION for direction.

J. M. Terrell, attorney general, and W. G. Brantley, solicitor general, for the plaintiff in error.

Goodyear & Kay, for the defendant in error.

⁹⁶ LUMPKIN, J. The Brunswick State Bank, which was a state depository, became insolvent while indebted to the state. On the petition of certain creditors of the bank a receiver was appointed to take charge of its assets, and the state, in whose behalf the governor had issued an execution according to law, became, by intervention, a party to the case, claiming that it had a first lien on all the assets, and praying for an order directing the receiver to turn over to the state, in preference to all other claims, all moneys received by him from the assets and securities of the bank, until the execution in favor of the state was fully satisfied.

Passing by a question of practice, the decision of which by this court was duly waived, there is but one question for our consideration.

1. That question arises as follows: Many persons who had deposits in the bank at the time it was closed were also indebted to it by promissory notes. They claimed the right, in settling with the receiver, to set off against their notes to the bank, held by him, the amounts of their respective deposits. The receiver presented a petition to the judge for direction in this matter, and, after the hearing, the court passed an order in the following terms: "It is ordered, considered, and adjudged by the court that the said receiver do, and he is hereby directed to, disregard the claims set up by the state of Georgia for a prior lien upon the papers of said bank to the exclusion of depositors of said bank, to offset upon said papers in the hands of said bank whatever amount there may have been to their credit at the date of the closing of said bank; and said receiver is further directed to allow parties indebted to said bank, where ⁹⁷ their promissory notes or other evidences of indebtedness are held by said bank, to offset and credit upon such evidences of indebtedness whatever sums may be to the credit of said parties upon the books of said bank at the date of the closing thereof."

To the granting of this order the state excepted. Were the notes in question assets of the bank upon which the state's lien takes effect, without reference to the liability of the bank to the makers of these notes for amounts justly due them, respectively, on their deposits? We think not. On the contrary, in our opinion, these notes were assets only in so far as there might be due to the bank balances upon them after deducting the amounts of the respective deposits, if those deposits were made bona fide while the bank was en-

gaged in the transaction of its regular business and had control of its books. In *Ray v. Dennis*, 5 Ga. 357, it was held that where the demands were mutual a setoff should be allowed in favor of a defendant against whom suit had been brought by an administrator on a demand due his intestate, the case proceeding upon the idea that only the net balance, after deducting the amount of the setoff, would be assets of an insolvent estate. *Moise v. Chapman*, 24 Ga. 249, lays down the doctrine that the debtor of a bank may make any defense to a suit brought against him by a receiver of the bank, which would be available in a suit against him by the bank itself. In this connection, attention is directed to section 2900 of the code, which distinctly recognizes the right of set-off. It was held in *Seay v. Bank of Rome*, 66 Ga. 609, that the lien of the state upon the property of a state depository was not limited to such property only as could be reached by levy and sale, but extended to all the property, including choses in action. This case, however, does not rule that claims held by the bank against others are assets of the bank ^{as} to their full amount, without reference to the bank's liability to the persons against whom it held these claims; but intimates to the contrary in holding that the assignee of an insolvent bank takes the assets subject to the preferences and priorities given by law. Outside of this state there are numerous authorities clearly affirming the right of a depositor in an insolvent bank to set off his deposits at the date of closing against any indebtedness of his own to the bank: See 1 Morse on Banks and Banking, sec. 338, and cases cited. The case of *Hannon v. Williams*, 34 N. J. Eq. 255, 38 Am. Rep. 378, rules that a depositor in an insolvent savings bank, who is also a debtor to the institution for money borrowed, is not entitled to set off the amount of his deposit against his indebtedness; but an examination of this case will show that it is based upon an exception to the general rule applicable to other banks, because in savings banks the depositors are themselves shareholders. The supreme court of Pennsylvania, in *Skiles v. Houston*, 110 Pa. St. 254, is to the same effect as our case of *Ray v. Dennis*, 5 Ga. 357, and holds that one indebted to the estate of a deceased insolvent banker had the right to set off against a note due from him to the banker the amount of a deposit he had made with the banker, although the note itself had not matured at the time of the

banker's death. The rule for which we are contending is also recognized in *Harlan v. Lumsden*, 1 Duvall, 86. In *Platt v. Bentley*, 11 Am. Law Reg. 171, the supreme court of New York held that a depositor in a national bank which had failed and passed into the hands of a receiver could set off the amount of a deposit he had in the bank against a debt due by him to the bank on a promissory note. We find the following in the American and English Encyclopædia of Law, under the title "Receivers," volume 20, page 135: "A receiver takes title to the property placed in his charge subject to all subsisting ^{••} liens against it. It follows that choses in action of the defendant pass to him subject to any equitable setoff which might have been set up in defense in an action by the defendant himself." And in the twenty-second volume of this same admirable work, under the title "Setoff," on page 308, it is stated that: "The general principle governing setoff against receivers seems to be that the receiver takes the property over which he is appointed receiver subject to any setoff which the defendant might have set up against the original owner." The rule that the debtor of an insolvent bank will be permitted to set off against his indebtedness to the bank its indebtedness to him is recognized in *Bolles on Banks*, sec. 389, and is supported by the cases there cited, among which is that of *Platt v. Bentley*, 11 Am. Law Reg. 171. We might multiply indefinitely the citation of authorities, but we think the above establish beyond question that a demand held by an insolvent bank against a third person is an asset of the bank only in so far as there may be a balance due upon the same after deducting whatever the bank may be owing the person against whom the demand is held. We are therefore satisfied that the court below reached the correct conclusion with reference to this question.

2. With reference to so much of the order passed by the court below as is quoted in the second head-note, we will remark that, with the record now before us, we are unprepared to say what claims of setoff should be allowed by the receiver, and therefore have announced that, in making his settlements with the various parties at interest, he will necessarily act at his peril in determining as to the real existence and rightfulness of any demand he may be asked to allow as a setoff, and will be responsible for any error he may commit.

Judgment affirmed.

SETOFF—RECEIVERS—INSOLVENT BANKS.—The appointment of a receiver of a bank does not affect the right of its debtors to set off demands held by them against the bank when it stopped payment: *Matter of Middle District Bank*, 1 Paige, 585; 19 Am. Dec. 452. If a depositor is indebted to a bank and the debt is due, a mutual right of setoff exists; that is to say, the depositor may set off this deposit against the debt, and the bank may set off the debt against the claim for the deposit; and if the bank becomes insolvent and a receiver is appointed, or its assets are placed in the hands of commissioners for liquidation, the depositor may still set off his deposit against his indebtedness, and this is true though such indebtedness be evidenced by promissory notes: See note to *Matter of Franklin Bank*, 19 Am. Dec. 420. A bank holding a depositor's note past due is entitled to set it off against the amount due him upon his deposit account: *Bank of Marysville v. Windisch-Muhlhauser Brewing Co.*, 50 Ohio St. 151; 40 Am. St. Rep. 660, and note.

The same question involved in the principal case was presented and decided in *Salladin v. Mitchell*, 42 Neb. 859. That was a proceeding by the assignee for the benefit of creditors of the Northwestern Banking Company of Milford for the purpose of foreclosing a mortgage executed by the defendant Mitchell to the insolvent corporation. Before its failure Mitchell sold the mortgaged property to his codefendant Borchers, who deposited for Mitchell the sum of seven hundred dollars with the banking company. It paid certain sums out of this deposit, leaving a balance due to Mitchell of three hundred and eighty-nine dollars and sixty-nine cents, for which it issued a certificate of deposit in his favor. A few days before the assignment Borchers deposited with the corporation the further sum of two hundred and fifty seven dollars and seventy cents, for which he received a certificate of deposit; and, a day or two later, his son, Edward Borchers, deposited the further sum of two hundred dollars, taking a certificate of deposit therefor in his own name. This sum was also claimed to be the property of the defendant Borchers, and all these sums were sought to be presented and allowed by way of setoff against the mortgage debt. In affirming the decree allowing these several claims the supreme court of the state said: "The only controversy presented by the answer of Mitchell is whether he is entitled to have the amount of his credit with the banking company at the date of the assignment applied in satisfaction of his indebtedness to the latter. The question is an important one, and has frequently been suggested in this court, although never before directly presented for decision. The right of setoff has been made the subject of statutory regulation in this state. The language of section 106 of the Civil Code is: "When cross demands have existed between persons under such circumstances that if one had brought an action against the other a counterclaim or setoff could have been set up, neither can be deprived of the benefit thereof by the assignment or death of the other, but the two demands must be deemed compensated so far as they equal each other." It is not clear whether the term "assignment" therein means an ordinary transfer of a claim or cause of action by the party in whose favor it exists, or whether it is used in the sense in which it is employed in proceedings in bankruptcy and insolvency. It appears, however, to have been given the latter interpretation in Ohio (see *Hade v. McVay*, 31 Ohio St. 231), although we do not rest our conclusion on that ground, but upon the proposition that the right of setoff existed according to well established equitable principles before the adoption of

the code, and that the assignee succeeded to the rights of the insolvent banking company as they existed at the date of the assignment, and no other or greater rights. The authorities bearing upon the proposition are not, it is conceded, altogether harmonious, but the rule as above stated has the support of a decided majority of the courts as well as text-writers, and rests upon the more satisfactory reasons. The following, among the many cases in point, are cited as sustaining the view above stated: *Hade v. McVay*, 31 Ohio St. 231; *Hodgson v. Barrett*, 33 Ohio St. 63; 31 Am. Rep. 527; *American Bank v. Wall*, 56 Me. 167; *Miller v. Receiver of Franklin Bank*, 1 Paige, 444; *Chace v. Chapin*, 130 Mass. 130; *Roberts v. Austin*, 26 Iowa, 315; 96 Am. Dec. 146; *Cook v. Cole*, 55 Iowa, 70; *Farmers' Deposit Nat. Bank v. Penn Bank*, 123 Pa. St. 283; *Chase v. Petroleum Bank*, 66 Pa. St. 169; *Van Wagoner v. Paterson Gas Light Co.*, 23 N. J. L. 283; *Clarke v. Hawkins*, 5 R. I. 219; *Cox v. Volkert*, 86 Mo. 505; *McCagg v. Woodman*, 28 Ill. 84; *Chance v. Isaacs*, 5 Paige, 592; *Smith v. Felton*, 43 N. Y. 419; *Rothschild v. Mack*, 115 N. Y. 1; *Nashville Trust Co. v. Fourth Nat. Bank*, 91 Tenn. 336; *Merwin v. Austin*, 58 Conn. 22; *St. Paul etc. Trust Co. v. Leck*, 57 Minn. 87; *post*, p. 000; *Schuler v. Israel*, 120 U. S. 506; *Carr v. Hamilton*, 129 U. S. 252; Pomeroy on Remedies, sec. 163, 169; Burrell on Associations, sec. 349; Waterman on Setoff, 118, 119. The leading cases asserting the opposing view, *Eastern Bank v. Capron*, 22 Conn. 639, and *Hartun v. Bishop*, 3 Wend. 13, are obviously in conflict with the more recent opinions of the courts of those states, which are cited above. It follows that Mitchell was entitled to the offset pleaded, and the decree in his favor is right.

2. We come now to a consideration of the questions raised by the answer of Borchers. While there is made no claim to a personal judgment against the defendant named, it will be remembered that he is owner of the land which is the subject of the controversy, and which it is sought by the foreclosure proceeding to sell for the satisfaction of the alleged balance on the mortgage. He was made a defendant for the single purpose of having determined his rights as against the plaintiff; and it is not only his privilege, but his duty as well, to set up whatever equities may exist in his favor against the mortgage. That an offset for money due from the plaintiff is available, and as effective for that purpose as payment or accord and satisfaction, we have no doubt either upon reason or authority: See *Bathgate v. Huskin*, 59 N. Y. 533; *Hess v. Final*, 32 Mich. 515; *Chapman v. Robertson*, 6 Paige, 627; 31 Am. Dec. 264; Jones on Mortgages, sec. 1496.

3. The remaining inquiry relates to the certificate of deposit issued to Edward Borchers. According to the testimony of the defendant he borrowed the money represented thereby from the payee, his son, for the purpose of completing his payment for the land in controversy, and executed his note therefor, payable twelve months after date, although the certificate was not indorsed by the payee. The finding on that issue was for the defendant, and is not seriously assailed at this time. Under a system like ours, which not only permits but requires every action to be prosecuted in the name of the real party interested, there seems to be no doubt that the right of setoff applies to any claim to which the party asserting it possesses the beneficial interest. Assuming, as was found by the district court, that Edward Borchers did in fact sell to the defendant his claim against the banking company, there is no doubt that the latter could have maintained an action therefor in his own name. Indeed, leaving out of consideration

any exceptional rights which might have existed in favor of the holder by reason of the negotiable character of the paper, the defendant is the necessary party and the only person who could have maintained an action or defense thereon. It follows that the claim under consideration was properly allowed as an offset. We find in the brief of the plaintiff a further contention, which is, in effect, that Borchers is now estopped to claim an offset on account of the two-hundred-dollar certificate of deposit, by reason of having procured his son, in whose favor it was drawn, to present it to the county judge for allowance against the estate of the banking company, and the receipt by the latter of a small dividend paid by the assignee. A sufficient answer to that contention is that no such issue is presented by the pleadings, the reply being a general denial of the allegations of the answer. It is the settled rule in this state that an estoppel, to be available as a cause of action or defense, must be specially pleaded: *Nebraska Mortgage Loan Co. v. Van Kloster*, 42 Neb. 746, and cases cited. The decree of the district court is right and is accordingly affirmed.

NORVAL, C. J., not sitting.

WAYCROSS OPERA HOUSE Co. v. SOSSMAN.

[94 GEORGIA, 100.]

LIEN UPON OPERA HOUSE FOR MATERIALS SUPPLIED FOR STAGE AND SCENIC OUTFIT.—Scenery and other articles forming the stage and scenic outfit of an opera house are part and parcel of the edifice as such, being essential to the completeness of a building of that kind. Hence, one who furnishes such articles furnishes material for the improvement of real estate, and is entitled to a special lien therefor upon the opera house and premises, under a statute giving to persons furnishing material for the improvement of real estate a special lien upon the real estate itself.

FORECLOSURE of lien.

John C. McDonald, for the plaintiff in error.

Hitch & Myers, for the defendant in error.

100 LUMPKIN, J. Section 1979 of the code gives to persons furnishing material for the improvement of real estate a special lien upon the real estate itself. The only question presented in this case is, whether or not scenery and various other articles constituting the stage and scenic outfit of an opera house are such things as may be properly classed as material for its improvement. In a strict sense, these articles, or some of them, may not be fixtures; but they are nevertheless essential to the completeness of a building of that kind. They necessarily form a part and parcel of the edifice itself. A dwelling-house may be absolutely complete and perfect as a building without a single article of

furniture in it; and although the ordinary articles of household furniture, such as beds, chairs, tables, carpets, draperies, and the like, may be indispensable to the comfortable use and enjoyment of a house as a dwelling, they are in no sense a part of the building itself. By a mere sale of the house they never pass, but are, when sold, the subject-matters of special contract. This, we apprehend, is not true as ¹⁰¹ to the furnishings and fittings of an opera-house stage. These things usually pass with a sale or lease of the building, without express stipulation. No one would ordinarily consider household furniture and belongings as a part of the premises, but every one would naturally regard the drop-curtain, wings, borders, set-houses, set-trees, balustrades, etc., as being parts of an opera-house edifice. These things usually remain permanently in the house where they are first set up, and are not moved about as furniture is from house to house when the owners change their places of abode. It is true, perhaps, that some traveling theatrical companies carry with them special scenery to more properly and advantageously set off particular plays, but this is the exception to the general rule, and in such instances the permanent outfit of the house is only temporarily displaced. We therefore find little difficulty in reaching the conclusion that the articles furnished by the plaintiffs in the present case were properly considered by the trial judge as being in the nature of material furnished for the improvement of the real estate, and consequently, he was right in holding that the plaintiffs were entitled to a lien for the value of the same upon the opera house and premises.

In Tennessee, under a statute which is, in substance, the same in the respect indicated as section 1979 of our code, decisions were made in the cases of *Grewar v. Alloway*, 3 Tenn. Ch. 584, and *Halley v. Alloway*, 10 Lea, 523, which are precisely in point, and sustain the ruling now made.

Judgment reversed.

A MECHANIC'S LIEN ATTACHES FOR STAGE MACHINERY, scenery, and seats furnished for and placed in a theater: See monographic note to *Chapin v. Peruse etc. Paper Works*, 79 Am. Dec. 275, on lien of materialmen. It will also attach, in the construction of a building for a hotel, to everything of a permanent character which will pass as a part of the freehold, and which is reasonably necessary to equip it for hotel purposes: Note to *Paulsen v. Mancke*, 9 Am. St. Rep. 538.

GEORGIA RAILROAD AND BANKING CO. v. WOOD.

[94 GEORGIA, 124.]

MASTER AND SERVANT—LIABILITY FOR ACTS DONE WITHOUT SCOPE OF SERVANT'S EMPLOYMENT.—A master is not liable for the acts of his servant done without the scope of the latter's employment. Hence, assuming that a brakeman has authority to keep trespassers off of a railroad train, there is no presumption that he is acting within the scope of his authority in throwing a stone at a boy, with a view of injuring him, after the latter has desisted from an attempt to swing or climb upon the train; and if the stone misses the boy, but hits another child, the railroad company is not liable for the injury thus done to the third person.

ACTION for damages.

J. B. Cumming, M. A. Candler, and Bryan Cumming, for the plaintiff in error.

Smith & Pendleton, for the defendant in error.

¹²⁵ **SIMMONS, J.** Anna Wood, a girl twelve years of age, was struck and injured by a stone thrown from a train of cars by an employee of the railroad company, and her father, as next friend, sued the company in her behalf for damages, and sued in his own behalf for the loss of her services. The cases were consolidated and tried together, and a verdict was rendered in each case in favor of the plaintiff. The railroad company made a motion for a new trial, which was overruled, and it excepted.

It appeared from the evidence that on the day of the injury, as the defendant's train was leaving Stone Mountain, a station on its line of road, a man standing on the top of one of the cars threw a stone at a boy who, with other boys, had just attempted to swing to or climb upon the train, and had previously been in the habit of committing or attempting similar trespasses, but who had then run off from the train into a private yard and was endeavoring to conceal himself behind a post. The stone missed the boy and struck the plaintiff's daughter, who was standing on the porch of his house. There was evidence tending to show that the man who threw ¹²⁶ the stone had been seen to throw stones from the train at these boys on previous occasions, and that he was acting in the capacity of a brakeman.

We think the court erred in not granting a new trial. The evidence is silent as to the specific duties of a brakeman, and does not show what authority this employee had from the

railroad company to keep trespassers off the train; but assuming that this came within the scope of his duties, no presumption arises that he was acting within the scope of his employment in throwing a stone at this boy with a view to injuring him after he had desisted from the trespass and gone off from the train. A master is not liable for the acts of his servant when such acts are not done within the scope of the employment in which the servant is engaged. If the brakeman, while these boys were engaged in the trespass, had, in attempting to prevent the trespass or cause them to desist, injured one of them through negligence or carelessness, or by using more force than was necessary for the purpose, the company would perhaps be liable: See *Wood on Master and Servant*, 537; *Rounds v. Delaware etc. R. R. Co.*, 64 N. Y. 129; 21 Am. Rep. 597. But after the boy had desisted the company would not be responsible for an injury inflicted on him by the brakeman in attempting to punish him for the trespass: See *Golden v. Newbrand*, 52 Iowa, 59; 35 Am. Rep. 257; *Allen v. London etc. Ry. Co.*, L. R. 6 Q. B. 65.

Judgment reversed.

MASTER AND SERVANT.—A MASTER IS NOT LIABLE FOR THE ACT OF HIS SERVANT, if the latter steps aside from his master's business and commits a wrong not connected with such business: *Stephenson v. Southern Pacific Co.*, 93 Cal. 558; 27 Am. St. Rep. 223, and note; *Ritchie v. Waller*, 63 Conn. 155; 38 Am. St. Rep. 361, and note. The general rule governing the liability of a master for the torts of his servant is the subject of a monographic note to *Ware v. Barataria etc. Canal Co.*, 35 Am. Dec. 192-201.

SOUTHERN HOME BUILDING AND LOAN ASSOCIATION v. HOME INSURANCE COMPANY.

[94 GEORGIA, 167.]

INSURANCE—PROOF OF LOSS BY MORTGAGOR OR MORTGAGEE.—Proof of loss stipulated for in a policy of fire insurance must be made within the time stipulated, as a condition precedent to the payment of the loss. If the property is mortgaged the mortgagee must comply with the requirement, if the mortgagor fails or refuses to do so, as such proof must be furnished by one or the other, in every case, unless waived by the insurance company, and cannot be dispensed with by what is called the "New York Standard Mortgagee Clause," declaring that no act or neglect of the mortgagor shall defeat the insurance as to the interest of the mortgagee.

INSURANCE—CONSTRUCTION OF CLAUSE AS TO ACT OR NEGLIGENCE OF MORTGAGOR.—A clause in a policy of fire insurance declaring that no act or

neglect of the mortgagor shall defeat the insurance as to the interest of the mortgagee refers to acts or neglect in connection with the property; while the risk is subsisting, and which under the terms of the policy would invalidate the insurance, such as conduct increasing the hazard, and not the omission, after the fire has occurred, to comply with provisions designed to secure evidence as to the nature and extent of the loss.

ACTION on a policy of fire insurance.

G. B. Whatley and R. L. Sibley, for the plaintiff.

Denmark & Adams, for the defendant.

¹⁶⁸ **SIMMONS, J.** The Southern Home Building and Loan Association sued the Home Insurance Company upon a policy of insurance issued by the defendant, insuring Rosa Tutty upon certain property for one year from December 17, 1892, to an amount not exceeding one thousand dollars, "loss, if any, payable to the Southern Home Building and Loan Association, as their interest may appear." Attached to the policy was what is called the "New York Standard Mortgagee Clause," in which it was stated that loss under the policy should be payable to the Southern Home Building and Loan Association as mortgagee, as its interest might appear, and that the insurance, as to the interest of the mortgagee only therein, should not be invalidated by any act or neglect of the mortgagor or owner of the property. The declaration alleged that while this policy was in force, on June 4, 1893, a fire occurred in the premises covered by the policy, by which the property insured was entirely destroyed; that immediately after the fire occurred, notice was given the insurance company of the loss, and afterward, during August, the usual "proof of loss" was made out by Prioleau, adjuster of the defendant, showing the premises insured under the policy to be of the value of nineteen hundred and forty-eight dollars and eighty cents, but failing to obtain the signature of the assured, Rosa Tutty, to the proof of loss, the defendant refused in consequence to pay over the loss to petitioner; ¹⁶⁹ that petitioner demanded payment of the loss as required by the policy, but the defendant refused to pay, etc. The defendant demurred to the declaration on the ground that it did not set forth any cause of action against defendant. In the argument upon the demurrer the defendant urged that the demurrer should be sustained, because the declaration did not aver that any proof of loss had been submitted to

defendant, as required by the contract or policy of insurance, or that any effort had been made by plaintiff to make such proof, or comply in any way with this requirement of the policy. The demurrer was sustained, and the plaintiff excepted.

The policy, a copy of which was attached to the declaration, contained a stipulation that if fire occurred the insured should give immediate notice of any loss thereby in writing to the insurance company, and should render a statement to the company, signed and sworn to by the insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof, and the amount of loss thereon, etc. Under this stipulation it was a condition precedent to the payment of the loss that the proof of loss stipulated for should be made out and submitted to the insurance company and within the time stipulated. If the mortgagor failed or refused to comply with this condition, it was incumbent upon the mortgagee to comply with it. If the mortgagee would not have the right in all cases to furnish the proof, he would certainly have that right in a case in which the mortgagor refused to do so. In every case, unless waived by the insurance company, it must be furnished by one or the other. See Richards on Insurance, sec. 158, and cases cited. It was contended that, so far as the mortgagee was concerned, this requirement was dispensed with by the stipulation ¹⁷⁰ in the "mortgagee clause" that the insurance, as to the interest of the mortgagee, should not be invalidated by any act or neglect of the mortgagor or owner of the property. We do not think so. We think this refers to acts of neglect in connection with the property, while the risk is subsisting, and which under the terms of the policy would invalidate the insurance, such as conduct increasing the hazard; and not the omission, after a fire has occurred, to comply with provisions designed to secure evidence as to the nature and extent of the loss. It is apparent from a reading of this clause, which, in addition to the stipulation referred to, contains others enumerating various acts which shall not invalidate the insurance as to the mortgagee, that the object of the clause was to afford protection to mortgagees against conduct beyond their control on the part of the mortgagor or others, which under the terms of the policy would invalidate the insurance. We see

no reason for holding that it was intended also to relieve a mortgagee, where loss occurred, from proving the loss as a condition precedent to collecting his claim against the insurance company; a condition which, as we have shown, the policy required the mortgagee himself to comply with, unless the mortgagor should do so.

The declaration failing to show that the insured or the mortgagee complied or attempted to comply with this condition, or that there was any waiver thereof on the part of the insurance company, the court below was right in sustaining the demurrer. The allegation that the adjuster of the company made out a proof of loss does not of itself show a waiver on the part of the company. If he made it out in behalf of the insured, it does not appear that she authorized or adopted it, for it is alleged that he failed to obtain her signature thereto.

We affirm the judgment of the court below, with direction that the plaintiff may, if it can, make good its ¹⁷¹ declaration by alleging the facts necessary to show its interest as mortgagee and the amount thereof, and by alleging also that the proof of loss was waived and how and when waived, or else that it was made within due time and how and when made; these amendments to be filed not later than the time of entering in the court below the *remittitur* from this court.

Judgment affirmed, with direction.

INSURANCE—PROOF OF LOSS—WAIVER.—A stipulation in an insurance policy as to furnishing proofs of loss must be complied with as a prerequisite to recovery, or the condition as to proof must be proved to have been waived: *Weidert v. State Ins. Co.*, 19 Or. 261; 20 Am. St. Rep. 809; *German Ins. Co. v. Fairbank*, 32 Neb. 750; 29 Am. St. Rep. 459.

INSURANCE.—A MORTGAGEE MAY SUPPLY PROOFS OF LOSS if the mortgagor neglects to do it, and may take advantage of any waiver of them by the insurance company: *Nickerson v. Nickerson*, 80 Me. 100.

WESTERN UNION TELEGRAPH COMPANY v. WATSON.

[94 GEORGIA, 202.]

TELEGRAPH COMPANIES—DISCLOSURE OF CONTENTS OF TELEGRAM—REMOTE DAMAGES.—If an agent contracts to sell goods, expecting to obtain a commission, and a delay occurs in the delivery, although no definite time is fixed, during which the contents of a telegram from the principal, explaining the delay, is, by some default of the telegraph company, made known to the customer, who immediately buys elsewhere, thus causing the agent to lose his commission, the agent cannot recover damages against the company for such loss on the theory that if the contents of the telegram had not been made known to the customer, an arrangement could have been made with him whereby the sale would have been consummated, and the agent would have obtained his commission. Such damages are too remote and uncertain for a recovery.

ACTION for damages. The plaintiff obtained a verdict against the company. Watson was the agent of the Brown Cotton Gin Company of New London, Connecticut, and, as such, sold to C. L. Pitner two gins of that company about August 1, 1892, for five hundred and ninety-five dollars, and on which sale his commission would have been two hundred and thirty-eight dollars. There was a delay in delivering the gins "owing to press of orders." This fact was conveyed to Watson by telegraph. Pitner, becoming impatient about the gins, as the season was upon him, went to the telegraph office, and there picked up the telegram about the delay, which was lying on the table, and read it. He at once went to Athens and bought two gins from other parties. Watson, in the mean time, was looking for Pitner and went to Athens to see him. Watson's object was to prevail upon Pitner to allow him to put in a new gin which he had on hand, and which Pitner could use until the gins which Watson had sold him came. Pitner agreed to do this provided he could countermand the orders with the parties from whom he had purchased in Athens. But this he was unable to do. Pitner testified that if he had not seen the telegram he would not have gone to Athens to buy gins from other parties. Watson, therefore, lost his commission on the sale. There was no time fixed for the delivery of the gin purchased from Watson.

Dorsey, Brewster & Howell, and G. D. Thomas, for the plaintiff in error.

W. M. Smith and Thomas & Strickland, for the defendant in error.

²⁰⁵ SIMMONS, J. Under the facts in this case, which will be found set out in the official report, the damages were too remote and uncertain to be the basis of a recovery for delay in delivering the telegram and for exposure of its contents to the plaintiff's customer before delivery. The damages did not result from any loss dependent on the state of his contract with the customer, as the contract actually existed at the time of the default by the telegraph company. Pitner, the customer, was to take from Watson two gins of the Brown Cotton Gin Company of New London, Connecticut. Pitner had waited for some time for the gins to be delivered to him, but had been disappointed. When the telegram was disclosed ²⁰⁶ to him he went to Athens and purchased another gin from a different person. This action is based on the theory that if the telegram had not been shown Pitner, Watson would have made a different arrangement with him; that he would have induced Pitner to consent to use another gin until the gins he was expecting to receive should arrive, and thus get his commission on the sale of those gins. In order to do this it would have been necessary to obtain the consent of Pitner, and Pitner might or might not have made the new arrangement with Watson. It is true Pitner says now that he would have made it, but we cannot tell whether he would have done so or not; he might have been in a different state of mind then from the state of mind he was in at the trial of the case. He might have consented to it or might not have done so. On the whole, we think the damages are too remote and uncertain to be the basis of a recovery.

Judgment reversed.

TELEGRAPH COMPANIES — DISCLOSURE OF MESSAGE—REMOTE DAMAGES. A telegraph company must not use or disclose the contents of messages: See monographic note to *Birney v. New York etc. Tel. Co.*, 81 Am. Dec. 617; and the statute sometimes makes a telegraph company liable for special damages occasioned by the disclosure of the contents of any private dispatch to any person other than to him to whom it is addressed or his agent; but if the damage claimed is a loss of that which might have been obtained, depending on the contingency of some expected action of a third party in the event of the contract being carried out, it is too remote to be regarded as within the contemplation of the party breaking the contract: See monographic note to *Western Union Tel. Co. v. Blanchard*, 45 Am. Rep. 496, 497.

GEORGIA SOUTHERN & FLORIDA RAILROAD COMPANY v. MERCANTILE TRUST & DEPOSIT COMPANY OF BALTIMORE, TRUSTEE. MCTIGHE v. MACON CONSTRUCTION COMPANY.

[94 GEORGIA, 303.]

CORPORATION DE FACTO, WHAT IS, AND POWERS OF. — A corporation, though organized and acting under an unconstitutional charter, is still a de facto corporation, and, as such, is capable of making contracts, acquiring and owning property, and of becoming bound to its creditors by all acts which would have been binding upon it had it been incorporated under the general state laws authorizing the formation of corporations with such powers.

CORPORATION DE FACTO, VALIDITY OF ACTS OF. — BONDS, DEEDS, AND MORTGAGES executed by a de facto corporation, though organized and acting under an unconstitutional charter, are valid, not only as against the corporation itself, but also as against any one making a claim upon its assets, whether as a creditor directly of the corporation, or as a creditor of its creditors or stockholders, if the general state law authorizes the formation of corporations having the same rights, duties, and liabilities as those specified in such charter.

USURY — WHAT IS NOT — ILLUSTRATION. — A loan of eight hundred and fifty dollars for the term of forty years is not rendered usurious by the lender taking a bond for one thousand dollars, bearing seven per cent interest per annum, payable semi-annually—although it bears interest from a date previous to its delivery, and provides that, after ninety days' default upon any installment of interest, the whole of the principal shall become due—if the gross amount of interest for the full term would not be equal to eight per cent per annum, if a fair and legal adjustment of the interest can be made in case the bond becomes due before the end of the term because of a default in the payment of interest, and if no device or contrivance to cover up usury appears.

CORPORATIONS DE FACTO—POWER TO MORTGAGE AFTER-ACQUIRED PROPERTY.—If there cannot lawfully be a corporation de jure, there cannot be one de facto; but, if the general state law authorizes the incorporation of a railroad, with power to bind, by mortgage or trust deed executed to secure bonds issued by it to provide funds for constructing its railroad, future-acquired property as well as property owned by it at the time of the execution of the instrument, a corporation de facto may do the same.

THERE MAY BE A DE FACTO CORPORATION if there is a law under which a corporation of the particular kind might be formed. A corporation not assuming to act without pretense of legal authority, but to organize according to some law, is a de facto corporation, especially where it does practically what the general state law requires, though not actually following it, or professing to do so.

RAILROAD COMPANIES—JURISDICTION TO FORECLOSE MORTGAGE OF LINE IN TWO STATES, AND TO SELL ITS PROPERTY.—If a railroad, forming a continuous line, and located partly in this state and partly in an adjoining state, is mortgaged by a corporation, whether de facto or de

jure, of which the courts of this state have jurisdiction, the mortgage consisting of a trust deed made to secure bonds issued by the corporation, a court of this state having jurisdiction over the corporation may, in the exercise of its equitable powers, make a decree foreclosing the mortgage, and enforce it by directing a sale of the entire railroad and the assets of the company in both states, and the execution of a proper conveyance to the purchaser by the receiver, the trustee, and the mortgagor.

RAILROAD COMPANIES—CONSOLIDATION AND MORTGAGE OF LINE IN TWO STATES—JURISDICTION IN FORECLOSURE PROCEEDINGS—EVIDENCE.—If a railroad company incorporated under the laws of another state is consolidated with a railroad company of this state, whether a corporation de facto or de jure, and this consolidated company executes a mortgage upon its corporate property situated in both states, and is really the party before the court as the mortgagor in foreclosure proceedings, the jurisdiction of the court over the consolidated company is the same as it would be over a corporation of this state, and the truth of the case as to the real mortgagor is admissible in evidence.

EQUITABLE PETITION. The commencement of this litigation was a petition in the nature of a creditor's bill filed, by McTighe & Co. against Georgia Southern & Florida Railroad Company, the Macon Construction Company, and others. A receiver of the defendant companies was appointed, and numerous interventions were filed, among them that of the Mercantile Trust & Deposit Company of Baltimore, trustee for the bondholders of the said railroad company, asking for the foreclosure of the mortgages given to secure the bonds. This intervention was, by agreement, segregated from the main case and from the other interventions, and tried separately. The railroad and construction companies filed several pleas, which were stricken on demurrer of the intervenor. An amendment was filed by McTighe & Co. to their petition, attacking the charter of the railroad company upon the ground that it was a special enactment subsequent to the passage of the general act for the incorporation of railroads, and was void, and that the bonds and mortgages to secure them, made by the railroad company, and held by the trust and deposit company, were also void. The construction company was alleged to be the real owner of the railroad and its property. It was also alleged that McTighe & Co. had never dealt with the railroad company, but that all their dealing had been with the construction company as owner of the road, etc. This amendment was disallowed. The pleas of the construction company were similar to those of the railroad company, except that the former was alleged to be the owner of all the stock and

property of the latter. These pleas were substantially as follows: 1. It appeared that the general assembly had passed a law having uniform operation throughout the state, providing for the incorporation of any and all railroad companies; and, the pretended charter of the railroad company having been granted by special law subsequent to the passage of the general law, it was contended that all the acts of the railroad company under such special law, including the borrowing of money and the execution of the bonds held by the intervenor as trustee, or by the persons represented by it, and the mortgages to be foreclosed, were void, as done without authority of law, and not binding upon it. 2. Certain property of the railroad company had been acquired by it after the execution of the mortgage sought to be foreclosed, and it was contended that such property was free from the lien of the mortgage, and not covered thereby. 3. It was contended that the bonds and mortgages were infected with usury. The bonds issued by the railroad company, and held by the intervenor, or by persons represented by it, consisted of 360 bonds for \$1,000 principal each, dated and executed July 1, 1887, and 3,060 bonds for \$1,000 principal each, dated and executed July 24, 1888, making an aggregate principal of \$3,420,000, payable in forty years, bearing interest from date at the rate of seven per cent per annum, payable on January 1st and July 1st of each year, and providing that after 90 days default upon any installment of interest the whole of the principal should become due. As a matter of fact only \$2,907,000 was loaned on the bonds, but interest was charged and received on the entire \$3,420,000, at the rate of seven per cent per annum; it being stipulated in each of the bonds that said interest should be reserved and paid on the face or par value thereof, instead of the amount actually received for each bond. The mortgages sought to be foreclosed, though in fact deeds attempting to convey into the intervenor as trustee the absolute title to the property therein described, were given to secure the amount of such bonds and interest. It was therefore claimed that \$513,000 of the \$3,420,000, together with the interest on \$513,000 from the date of the bonds, which interest was also included in the bonds and mortgages, was usury; that plaintiff's demand should be reduced by the sum of \$513,000, together with interest thereon, and all interest paid on the \$513,000 in the past, amounting to \$189,550; and that, as the bonds were

usurious, the deeds or instruments given to secure the payment were absolutely void. It was also claimed that interest was required before the delivery of the bonds. The 360 bonds were delivered January 19, 1888, and on that day \$306,000 was obtained on them; but interest was charged and received from January 1, 1888. The interest coupons which matured on July 1, 1888, represented the interest on the bonds from January 1, 1888, to July 1, 1888, and included the interest for the nineteen days from January 1 to January 19, 1888. These coupons were paid by the defendant in full, and no deduction was made for the nineteen days, nor was credit for the nineteen days' interest allowed or contemplated at the time of the loan on January 19, 1888. The defendant having contracted to pay interest from January 1, 1888, and having had the use of the money only from January 19, 1888, it is contended that the interest for the nineteen days was improperly required of it, as well as the \$54,000 taken and reserved as discount in advance, both of said sums being interest charged and paid for the first year of each loan, and being usury. The amount of this interest so overcharged was \$1,320. A similar claim was made respecting the 3,060 bonds. The amount of interest or discount in advance claimed to have been taken as to these bonds was \$459,000, and the amount of interest overcharged for the time between the date of issue and the date of delivery was \$19,380. 4. The material portions of the mortgages or deeds of trust in question, dated January 3 and July 24, 1888, and introduced in evidence, were recitals that the Georgia Southern & Florida Railroad Company, a corporation under the laws of Georgia, was by state authority authorized to consolidate with any railroad in Florida; that the Macon & Florida Air-Line Company, a railway corporation under the laws of Florida, had like authority to consolidate with any railroad company either in or out of Florida; and that the two said companies effected a consolidation under the name of the Georgia Southern & Florida Railway Company, and executed the mortgage or deed of trust in favor of the trustee. There were further recitals as to the resolutions of the board of directors, thereafter adopted and confirmed by the stockholders, authorizing the issue of coupon bonds of \$1000 each, secured by the mortgage or deed of trust covering the railroad from Macon to Palatka, Florida, with all its properties enumerated, etc. One provision among others was, that, in default of the

payment of interest upon any of the bonds for a certain period, the whole principal sum secured by the deed should become due and payable, with the right in the trustee to sell the property under certain regulations, or to apply to any court of competent jurisdiction to foreclose the mortgage, etc. The intervenor proved that the Macon and Florida Air-line was incorporated under the laws of Florida, and that this company was consolidated with the other, as one railroad company, operating a railroad from Macon, Georgia, to Palatka, Florida. Objections were made that such evidence was irrelevant and illegal, because the court had no jurisdiction over the railroad and other property in Florida, or authority to make any judgment concerning the same, but they were overruled, and the same ground of error was assigned upon the charge of the court, and upon the decree entered on the verdict finding that the mortgages or deeds of trust should be foreclosed on the property in both states, and making directions for its sale.

Anderson & Anderson, for the railroad and construction companies.

Hardeman, Davis & Turner, for McTighe & Co.

Hoke Smith, Washington Dessau, Steed & Wimberly, Bacon & Miller, S. A. Reid, Gustin, Guerry & Hall, Hill, Harris & Birch, and C. L. Bartlett, for the trustee and other parties.

313 LUMPKIN, J. The controlling questions presented in these cases are indicated in the headnotes. How these questions arose will appear from an examination of the reporter's statement.

We have not decided, and will not discuss, whether or not a special charter granted by the general assembly to a railroad company after the passage of the general law for the incorporation of railroad companies is unconstitutional, and therefore void. Among many good reasons which might be stated for pursuing this course, and which would doubtless be accepted as satisfactory, we deem it sufficient to say it is not now necessary to pass upon this question, it not being essential to a proper disposition of the present cases. We wish it distinctly understood, however, that we do not intend in anything which follows to intimate any opinion whatever upon this question, and if any expression we may use should seem to do so, it must not be so construed.

1. If such a charter is unconstitutional, is not a company organized under it at least a de facto corporation, and, as such, capable of making contracts, acquiring and owning property, and of becoming bound to its creditors by all acts which would have been binding upon it had it been duly incorporated under the general law? We entertain no doubt at all, and will presently endeavor to show, that this question should be answered in the ^{§14} affirmative; and, if so, it will follow that bonds, deeds and mortgages executed by the de facto corporation are valid, not only as against the corporation itself, but also as against any one making a claim upon its assets, whether as a creditor directly of the corporation or as a creditor of its creditors or stockholders. It is too well settled, both upon principle and authority, to require argument, that neither a de facto corporation, nor those that recognize and deal directly with it as a corporation, will be heard to deny its rightful corporate existence; and there is no good reason for applying a different rule to one claiming assets of a de facto corporation acquired solely in the exercise of corporate functions, but for the assumption of which there would have been no company of any kind, and, of course, no assets. Nor is it at all material whether the claim be made directly or indirectly. Whatever may be the manner in which it is presented, if the assets sought to be reached were in fact assets of a de facto corporation, the very act of making the claim puts the claimant in the same legal attitude as a direct creditor of the corporation; for such claimant has no greater right in the premises than his debtor, of whose rights he seeks to get the benefit, and consequently can no more dispute the existence of the corporation than could the latter. So far, therefore, as the parties to this record are concerned, we have only to show that railroad companies operating in Georgia under special legislative charters granted after the passage of the general law referred to, are at least corporations de facto.

The fact that this very law was in force at the time the railroad companies involved in the present litigation obtained their special charters, makes it absolutely certain that, even if these charters are mere nullities, lawful and valid charters might have been obtained for just such companies. In other words, there was beyond doubt legal authority in this state for incorporating railroad ^{§15} companies with substantially the same rights, powers, duties and liabilities as those speci-

fied in the special charters. This is a most important fact, for where there cannot lawfully be a corporation de jure there cannot be one de facto. This was distinctly ruled in *Evenson v. Ellingson*, 67 Wis. 634. "If an organization is completed when there is no law, or an unconstitutional law, authorizing such organization as a corporation," one who contracted with the organization is not estopped from denying its corporate existence: *Heaston v. Cincinnati, etc. R. R. Co.*, 16 Ind. 276; 79 Am. Dec. 430. See, also, *Snyder v. Studebaker*, 19 Ind. 462; 81 Am. Dec. 415, and cases there cited. In *St Louis etc. Assn. v. Hennessy*, 11 Mo. App. 555, it was held, that one who had subscribed for stock in a supposed corporation prohibited by the state constitution was not estopped from denying its lawful existence. "Corporations cannot exist except by force of express law. A society that cannot be incorporated because organized to resist the enforcement of laws, cannot sue in its society name for the collection of a debt." *Detroit Schuetzen Bund v. Detroit Agitations Verein*, 44 Mich. 818; 38 Am. Rep. 270. "A corporation organized under a void law cannot enforce a mortgage made to it; but if not organized for an unlawful purpose, a receiver for it can demand in equity an accounting for the debt purporting to be secured thereby": *Burton v. Schildbach*, 45 Mich. 504. "A corporation de facto cannot exist in the absence of a law authorizing its organization; and, in such a case, the carrying on of the business in the corporate name is no evidence of user which can be considered in aid of corporate existence": *Eaton v. Walker*, 76 Mich. 579. In this connection see, also, *Scovill v. Thayer*, 105 U. S. 143, and *Norton v. Shelby County*, 118 U. S. 425. One of the headnotes in the latter case is as follows: "An unconstitutional act is not a law; it confers no rights; it imposes no duties; ³¹⁶ it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed"; and, accordingly, it was held that the acts of a person assuming to perform the duties of an office which was created by an unconstitutional law, and therefore having no de jure existence, were utterly void.

We may assume, without further citation of authorities, and without attempting any argument on the subject, that where the existence of a corporation of a given kind is positively forbidden by law, or where there is no valid, constitutional law authorizing the creation of such a corporation, it cannot exist even as a corporation de facto. The rule thus

stated does not, by any means, however, negative the soundness of the proposition that an organization assuming to be a corporation de jure, but for sufficient reasons not so in fact, may be a corporation de facto when it is of such a character that it could, under existing laws, have full and complete corporate being and powers. The doctrine is thus broadly stated in *Snyder's Sons Co. v. Troy*, 91 Ala. 224, 24 Am. St. Rep. 887: "A corporation de facto exists when, from irregularity or defect in the organization or constitution, or from some omission to comply with conditions precedent, a corporation de jure is not created, but there has been a colorable compliance with the requirements of some law under which an association might lawfully be incorporated for the purpose and with the powers assumed, and a user of the rights claimed to be conferred by the law; that is, when there is an organization with color of law, and the exercise of corporate franchises and functions." In *Stout v. Zulick*, 48 N. J. L. 601, it is said: "Where it is shown that there is a charter or a law under which a corporation, with the powers assumed, might lawfully be incorporated, and there is a colorable compliance with the requirements of the charter or law, and a user of the rights ³¹⁷ claimed under the charter or law, the existence of a corporation de facto is established. The supreme court of Illinois, in *McCarthy v. Lavasche*, 89 Ill. 270, 31 Am. Rep. 83, held, in substance, that even where a corporation has been formed under a charter which is unconstitutional and void, the stockholders would be estopped from urging this fact in order to defeat the collection of a bona fide debt against the corporation which a creditor is seeking to enforce under a provision of the charter making the stockholders liable individually. And see *Hudson v. Green Hill Seminary Corp.*, 113 Ill. 618, as to what will constitute proof of the existence of a de facto corporation. "A de facto corporation, that by regularity of proceeding might be one de jure, can sue and be sued; and a party who contracts with such corporation, while it is acting under its de facto organization, is estopped, in a suit on such contract, from denying such organization at the date of the contract": *Heaston v. Cincinnati etc. R. R. Co.*, 16 Ind. 276; 79 Am. Dec. 430. The case of *East Norway Lake etc. Church v. Froislie*, 37 Minn. 447, is strongly in support of the proposition that there may be a de facto corporation where there is a law under which a corporation of the particular kind might be formed; and the decision seems to have been made irre-

spective of the question whether, in organizing the corporation, there was an attempt to comply with the requisite legal forms or not. This case also holds that no private person will be allowed to attack collaterally the regularity of the organization of such corporation. "A party is estopped to deny the existence of a corporation at the time he contracted with it as such, if the corporation could constitutionally exist": *Brookville etc. Turnpike Co. v. McCarty*, 8 Ind. 392; 65 Am. Dec. 768. In Missouri it had been held that even where a corporation is organized under a special charter, void because of a constitutional provision for incorporation by general law, a private party cannot ³¹⁸ question its rightful existence when it is recognized by the state, the latter alone being allowed to raise the question: *St. Louis v. Shields*, 62 Mo. 247. We find the following in *Central etc. Assn. v. Alabama Gold Life Ins. Co.*, 70 Ala. 120: "When an association of persons is found in the exercise and user of corporate franchises, under color of legal organization, their existence as a corporation cannot be inquired into collaterally; if the state acquiesces in the usurpation individuals cannot complain." The general rule that private persons will not be allowed to attack collaterally the validity of a de facto corporation is supported by many authorities, among which may be mentioned: *Stout v. Zulick*, 48 N. J. L. 601, and cases there cited in note; *Duggan v. Colorado etc. Co.*, 11 Col. 113, and cases cited; *Tar River Nav. Co. v. Neal*, 3 Hawks, 520; *Hasselman v. United States Mortgage Co.*, 97 Ind. 365, and authorities cited.

In addition to the numerous cases above noticed, we have examined a very large number of others decided in states other than our own, many of which are more or less pertinent to the question in hand. In some there are expressions and rulings not entirely in harmony with the conclusion we have reached, but we think we have settled upon and announced the true law. Before concluding this division of the present opinion, we will briefly refer to a few of our own cases which support the doctrine here laid down: *McDougald v. Bellamy*, 18 Ga. 411, recognizes the rule that a corporation, though unlawfully organized, is so far a valid corporation as to make it liable to creditors for its own acts: See, also, *Georgia Ice Co. v. Porter*, 70 Ga. 637. In *Planters' etc. Bank v. Pudgett*, 69 Ga. 159, it was held that, although a charter granted by the superior court to a manufacturing company was void, one

who dealt with the company as a corporation ^{§19} could not deny its corporate existence. Where one corporation has dealt with another company as a corporation, recognizing it as such, the first corporation is estopped from denying the existence of the second: *Imboden v. Etowah etc. Min. Co.*, 70 Ga. 86. On page 107 Chief Justice Jackson says: "This court, as indeed all civilized courts, has ruled that such recognition of a being—even of an artificial being—will stop the mouth of any other being, natural or artificial, from denying, in a case growing out of such recognition, that the being thus recognized ever had being. See, in this connection, *Lester v. Georgia etc. Ry. Co.*, 90 Ga. 802.

Our decision is not based upon the idea that the organization of these railroad companies under unconstitutional charters would make them de facto corporations, but upon the idea that, the purpose for which they were organized being lawful and proper if they had obtained charters under the general law and organized under them, which they might have done, they would, in substance, have done what they actually did; that is, they would have observed about the same forms and requirements in the one case as in the other. They undoubtedly attempted to organize according to some law, and did not set up to be corporations without pretense of legal authority. If the laws under which they proceeded were not good, they may, in our judgment, avail themselves of the existence of the general law on our statute book, and of its terms, at least so far as to enable them to be regarded as de facto corporations, because they have done practically what that general law required, though not actually following it nor professing to do so.

2. No question was raised as to the power of either of the railroad companies, under its special charter, to embrace in a mortgage property acquired after the execution of the mortgage. The right to mortgage "future ^{§20} acquired property" was denied solely on the ground that these companies, being without legal charters, had no charter power for so doing, and that there was no other source from which such right could be lawfully derived. While it is true that section 1954 of the code in effect restricts (except as to stocks of goods or other things in bulk, but changing in specifics) the property which a mortgage may embrace to that "in possession, or to which the mortgagor has the right of possession," it is also true that the general law of this state for

incorporating railroad companies expressly provides that a company created thereunder may, by mortgage or trust deed executed to secure bonds issued to provide funds for constructing its railroad, bind property acquired after the execution of the instrument. If we have succeeded in showing that these railroad companies, supposing their special charters to be void, are de facto corporations because of the existence of the general law, it would seem that they could make any contracts authorized by that law, and become bound by such contracts to those with whom the same were made. As a practical proposition, it is well known that most, if not all, of the railroads of any length in the United States which have been built for years past, have been constructed by issuing, in advance, bonds upon their entire lines, including the unbuilt portions as well as those already constructed, with mortgages to secure the bonds covering the whole. If a de facto railroad company is a corporation for any purpose at all, it ought, on general principles, to have the power to mortgage "future acquired property," and this seems to be the doctrine very generally recognized by the courts. Upon this question see: *Wright v. Bircher*, 72 Mo. 179; 37 Am. Rep. 433; *City of Quincy v. Chicago etc. R. R. Co.*, 94 Ill. 537; *Wade v. Chicago etc. R. R. Co.*, 149 U. S. 327; *Williams v. Winsor*, 12 R. L. 9; ²²¹ *Branch v. Atlantic etc. R. R. Co.*, 3 Woods, 630; *Seymour v. Canandaigua etc. R. R. Co.*, 25 Barb. 284; *Holroyd v. Marshall*, 10 H. L. Cas. 191. And these citations might be indefinitely multiplied.

3. The third headnote expresses the views we entertain of the usury question presented. A calculation will show that if the bonds ran to full maturity, as contemplated, the lender of the money would not receive, in the aggregate, as much as 8 per cent per annum for the use of the money, although at the beginning he put out on each bond only \$850, and at the end received \$1,000. The \$150 added to the 6 per cent interest annually received would not amount to as much as 8 per cent per annum on \$850 for the full term. That the bonds by their terms bore interest from a date previous to their delivery makes no difference, because, notwithstanding this fact, the gross amount of interest for the full term would not have been equal to 8 per cent per annum. So the original contract, if the bonds ran forty years, was not usurious; and it does not appear that they contained any stipulation which would prevent a fair and legal adjustment of the

interest between the parties in case the bonds became due earlier because of a default in paying interest. Nor does it appear that, in providing for the maturity of the bonds in case of such default, there was any device or contrivance to cover up usury.

The above is applicable if the railroad company issued the bonds and borrowed money directly on them. If that company delivered the bonds to the construction company under a contract with it, the latter, of course, had a right to sell them at any discount it pleased, and there would be no usury in such a transaction.

4. Had the decree foreclosing the mortgage on the Georgia Southern & Florida Railroad Company and directing a sale of all its property in both states been made by a court of the United States its validity could ~~not~~ hardly be doubted. The following federal cases are conclusive upon this question, and we are confident there are others to the same effect: *Randolph v. Wilmington etc. R. R. Co.*, 11 Phila. 502; *Blackburn v. Selma etc. R. R. Co.*, 2 Flipp. 525; *Wilmer v. Atlanta etc. Ry. Co.*, 2 Woods, 409, 447; *Muller v. Dows*, 94 U. S. 444. The opinion of Mr. Justice Strong, in the case last cited, is so clear and pertinent, we feel justified in making copious extracts from it: "If such a foreclosure and sale cannot be made of a railroad which crosses a state line and is within two states, when the entire line is subject to one mortgage, it is certainly to be regretted, and to hold that it cannot be would be disastrous, not only to the companies that own the road, but to the holders of bonds secured by the mortgage. Multitudes of bridges span navigable streams in the United States, streams that are boundaries of two states. These bridges are often mortgaged. Can it be that they cannot be sold as entireties by the decree of a court which has jurisdiction of the mortgagors? A vast number of railroads, partly in one state and partly in an adjoining state, forming continuous lines, have been constructed by consolidated companies, and mortgaged as entireties. It would be safe to say that more than one hundred millions of dollars have been invested on the faith of such mortgages. In many cases, these investments are sufficiently insecure at the best. But if the railroad, under legal process, can be only sold in fragments; if, as in this case, where the mortgage is upon the whole line and includes the franchises of the corporation which made the mortgage, the decree of foreclosure and sale

can reach only the part of the road which is within the state, it is plain that the property must be comparatively worthless at the sale. A part of a railroad may be of little value when its ownership is severed from the ownership of another part. And the ³²³ franchise of the company is not capable of division." The learned justice further says that it is "undoubtedly a recognized doctrine that a court of equity, sitting in a state and having jurisdiction of the person, may decree a conveyance by him of land in another state, and may enforce the decree by process against the defendant. True, it cannot send its process into that other state, nor can it deliver possession of land in another jurisdiction, but it can command and enforce a transfer of the title. And there seems to be no reason why it cannot, in a proper case, effect the transfer by the agency of the trustees, when they are complainants. In *McElrath v. Pittsburg etc. R. R. Co.*, 55 Pa. St. 189—a bill for foreclosure of a mortgage—in which it appeared that a railroad company, whose road was partly in Pennsylvania and partly in West Virginia, had mortgaged all their rights in the whole road, the court decreed that the trustee who had brought the suit, being within its jurisdiction, should sell and convey all the mortgaged property, as well that in the state of West Virginia as that in Pennsylvania. This case is directly in point, and tends to justify the decree made in the present case. The mortgagors here were within the jurisdiction of the court. So were the trustees of the mortgage. It was at the instance of the latter the master was ordered to make the sale. The court might have ordered the trustee to make it. The mortgagors who were foreclosed were enjoined against claiming property after the master's sale, and directed to make a deed to the purchaser in further assurance. And the court can direct the trustees to make a deed to the purchaser in confirmation of the sale. We cannot, therefore, declare void the decree which was made."

The remaining question is, Can a state court, in a case of the kind now under consideration, with all the parties at interest before it and having jurisdiction of the ³²⁴ corporation, decree a foreclosure and direct a sale of the entire railroad and the assets of the company in both states? We think that, taking the precautions and following the course indicated in the headnote, it can. The leading case in support of this proposition is that of *McElrath v. Pittsburg etc. R. R. Co.*, 55 Pa. St. 189, mentioned by Mr. Justice Strong. It is,

for our purpose, squarely in point; and the fact that it was cited approvingly in a case decided by the supreme court of the United States makes it a very strong authority. It would therefore seem immaterial whether the jurisdiction in question is exercised by a state or a federal court. We deem it unnecessary to say more on this subject, except to cite the following authorities, which, to a greater or less extent, sustain the conclusion we have reached: *Mead v. New York etc. R. R. Co.*, 45 Conn. 199; *Hand v. Savannah etc. R. R. Co.*, 12 S. C. 314; *Wood v. Goodwin*, 49 Me. 260; 77 Am. Dec. 259; 3 Wood's Railway Law, sec. 474; Jones on Railroads, secs. 413, 414.

If the foregoing views are sound it follows, of course, that in admitting the evidence referred to in the headnote, no error was committed by our gifted brother Gamble, of the circuit bench, who handled with great skill these important and somewhat complicated cases.

Judgment affirmed.

CORPORATION DE FACTO, WHAT IS.—A body is regarded as a de facto corporation only where there has been an effort to conform to the forms of law in establishing a corporation, and some formal defect exists merely as to the mode of complying with the law, and the body is dealt with and acts as a corporation: *Allen v. Long*, 80 Tex. 261; 26 Am. St. Rep. 735, and note. Where there is no corporation de jure there cannot be a corporation de facto, unless the alleged corporation has at least attempted to do some corporate act or to exercise some corporate power. To give a body of men the status of a de facto corporation there must have been an apparent attempt on their part to perfect a corporate organization under statutory authority, and a user of corporate powers pursuant to such attempted organization. If these conditions are satisfied it is not necessary that there should be a full, or even a substantial compliance with the provisions of the law: *Martin v. Deets*, 102 Cal. 55; 41 Am. St. Rep. 151, and note.

CORPORATIONS—RAILROAD COMPANIES—MORTGAGES.—A corporation has power to mortgage its realty: *Gordon v. Preston*, 1 Watta, 385; 26 Am. Dec. 75, and note. If part of a railroad is in one state and part of it in another, and it sought to redeem from a mortgage embracing the whole railroad in both states, the plaintiff must redeem the whole if any: *Wood v. Goodwin*, 49 Me. 260; 77 Am. Dec. 259; whether there are two distinct corporations or one only, under the charters granted by the two legislatures: See the case last cited.

RAILROAD COMPANIES—CHARTERS GRANTED BY TWO STATES—CONSOLIDATION OF CORPORATION.—A charter granted by two states to a company to construct a railroad is not only a contract with the company but a compact between the states. It is to be liberally construed with reference to its objects. Like a treaty it is the law of the contracting states, not being subject to interpretation by the local usages of either. The same construction must be made in both: *Cleveland etc. R. R. Co. v. Speer*, 56 Pa. St. 325;

94 Am. Dec. 84. In some jurisdictions the consolidation of railroad companies is authorized only where the lines consolidated will form one continuous railroad: *State v. Atchison etc. R. R. Co.*, 24 Neb. 143; 8 Am. St. Rep. 164. But when the legislature authorizes the consolidation of two or more railway companies, the consolidated company succeeds to the property of each of the companies held by it before the consolidation: *Louisville etc. Ry. Co. v. Blythe*, 69 Miss. 939; 30 Am. St. Rep. 599, and note.

USURY.—In determining whether a contract is usurious the intent to take or reserve more than lawful interest must be considered: *Falls v. United States etc. Bldg. Co.*, 97 Ala. 417; 38 Am. St. Rep. 194. Usury cannot be imputed to the reserving and receiving in advance the highest lawful rate of interest: *Vahlberg v. Keaton*, 51 Ark. 534; 14 Am. St. Rep. 73.

MATHIS v. WESTERN UNION TELEGRAPH COMPANY.

[94 GEORGIA, 333.]

TELEGRAPH COMPANIES—PUBLIC POLICY—OBJECT OF STATUTE IMPOSING PENALTY.—A statute imposing a penalty upon telegraphic companies for default in the transmission or delivery of messages is based upon public policy, the object of which is to quicken the diligence of these companies in the performance of their duties to the public.

TELEGRAPH COMPANIES—DAMAGES—PENALTY.—A claim against a telegraph company for damages, and a claim against it for a statutory penalty, are separate and distinct.

TELEGRAPH COMPANIES—LIABILITY OF FOR STATUTORY PENALTY.—Notwithstanding a stipulation printed upon a blank on which a telegraph message is sent, that "the company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission," the company is liable for a statutory penalty though the claim for it is not presented within such time.

TELEGRAPH COMPANIES—USE OF BLANKS—PENALTY CLAUSE.—A telegraph company cannot require a customer to use a blank with a stipulation upon it exempting the company from liability for a statutory penalty, and his voluntary use of it is not binding on him. The matter is not a subject of contract between the parties, and any agreement between them tending to defeat such penalty is void.

ACTION for a statutory penalty. The case turned upon the question as to whether the company was relieved from the penalty by reason of no claim having been presented within the time prescribed by the stipulation on the blank upon which the message was sent. There was a finding in favor of the company.

W. T. Lane, Hardeman, Davis & Turner, and James Dodson & Son, for the plaintiff.

Gustin, Guerry & Hall, for the defendant.

³³⁹ LUMPKIN, J. Mathis brought an action against the telegraph company for the statutory penalty. The blank upon which his message was written had printed upon it the following stipulation: "The company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission." The only question presented for our determination is, Whether or not the company is relieved from the penalty in a case where the claim for it was not presented within the time prescribed by this stipulation? The court below adjudicated in favor of the telegraph company upon this question, and the majority of the court are of the opinion that this judgment was erroneous.

In *Hill v. Western Union Tel. Co.*, 85 Ga. 425, 21 Am. St. Rep. 166, it was held that a stipulation on a blank upon which a telegraphic message was written, to the effect that the company would not be liable for damages in any case where the claim was not presented within sixty days after sending the message, was a reasonable regulation, and therefore obligatory upon the sender. But in *Western Union Tel. Co. v. James*, 90 Ga. 254, it was held that the contractual limitation of sixty days for presenting a claim for damages against a telegraph company did not apply to the statutory penalty. To the same effect, see *Western Union Tel. Co. v. Cooledge*, 86 Ga. 104. Thus it has been settled that a claim for damages and a claim for the penalty are separate and distinct things. In none of the cases above mentioned, however, was the question presented in the case at bar made or passed upon. The identical question arose and was decided in *Western Union Tel. Co. v. Jones*, 95 Ind. 228, 48 Am. Rep. 713, in which it was held by the supreme court of Indiana that a telegraph company may lawfully contract that a ³⁴⁰ claim for a statutory penalty shall be made within a reasonable time, and that in the absence of special circumstances sixty days is not unreasonable. The Missouri court of appeals, in *Montgomery v. Western Union Tel. Co.*, 50 Mo. App. 591, decided that the terms "any claim," in a telegraph message blank, included a statutory penalty; and in the same case it was held that a stipulation in such a blank that the company would not be liable for damages unless the claim therefor was made in writing and presented to the company within sixty days after receipt of the message, would protect the

company from liability for the statutory penalty, where no claim had been presented by the plaintiff and his action was instituted more than sixty days after delivery of the message to the company.

We cannot follow these courts in the conclusions above announced. Our statute imposing a penalty upon telegraphic companies for default in the transmission or delivery of messages is based upon public policy, the object of which is to quicken the diligence of these companies in the performance of their duties to the public. This policy cannot be annulled or defeated by mere regulations adopted by a telegraph company, or by stipulations printed upon its blanks in pursuance of such regulations. The company has no right to require a customer to use a blank with a stipulation upon it as to penalty such as that which was printed on the blank upon which the message of the plaintiff was written. The mere fact that a customer voluntarily uses such a blank without objection is of no consequence. As he could not be compelled to use it, his so doing is really without consideration, so far as he is concerned, and is not binding upon him. Besides, this is not a matter for contractual negotiations between the parties. In *Western Union Tel. Co. v. Taylor*, 84 Ga. 408, it was said that "the penalty is for the wrongful violation ²⁴¹ of a public duty, and neither in whole nor in part for a mere breach of contract," and this conclusion is borne out by the reasoning of Chief Justice Bleckley on pages 413, 414, and the authorities there cited. We have not the slightest idea that in enacting the statute now under consideration the general assembly ever supposed or intended that a telegraph company would be able to protect itself against the payment of a penalty in the manner here attempted. On the contrary, we feel certain that to allow this to be done would be violative of the legislative policy, and in a large measure would defeat the purpose for which the statute was passed.

It was argued that our statute was adopted from that of Indiana after the decision in *Western Union Tel. Co. v. Jones*, 95 Ind. 228, 48 Am. Rep. 713, and, consequently, that the construction of that statute by the supreme court of that state should be followed by this court. Our statute is not identical with that of Indiana; and, besides, we find upon examination that similar statutes, varying more or less in terms, have been passed in a number of the states of this union, from several of which it might, with equal propriety, be said

our statute was taken. But granting, for the sake of the argument, that ours is an adoption of the Indiana statute, the answer to the above contention is, that the Indiana case in no sense involved a construction of the meaning of any words or phrases used in their statute. The court was simply passing upon a contract, or an alleged contract, of which the statute said nothing, and which was urged as a defense to a case arising under the statute. The court was not undertaking to interpret the statute itself. We understand the rule invoked to be applicable where one state adopts legislation existing in another, the courts of which have construed and interpreted the meaning of language used in the statute. An illustration which occurs to us at the moment may be found in the case of *Ocean Steamship Co. v. Way*, 90 Ga. 747. ³⁴² There it appeared that the term "trinkets," as used in the "English Carriers Act," from which our act of congress was borrowed, had been given by the English courts a certain meaning; and it was held that, in adopting the English statute, congress advisedly used the word "trinkets" as having the meaning which the English courts had attached to it.

On the whole, we do not feel under any restraint from any source to do otherwise than follow our own conclusion upon the question at bar, which we have deliberately reached after a most anxious and careful consideration.

Judgment reversed.

SIMMONS, J., dissenting. That a corporation transacting business with the public has a right to make all reasonable rules and regulations for the government of its business, is too well settled to require the citation of authorities; it is universally held by all courts. On this principle, courts hold that an insurance company has a right to stipulate with the assured that, in case of loss, he must make out his proof of loss and submit it to the company within a specified time, or his right of action to recover for his loss is barred. On the same principle, courts hold that a telegraph company has the right to contract with the sender of a message that he must give written notice of his claim for damages arising from a breach of contract within a specified time, or his right to recover will be barred. This is held, too, in the face of the statute which gives the sender a much longer time to bring his action for his damages. It is held on the principle that the company has a right to make reasonable rules and regulations

in the transaction of its business with the public; and such rules and regulations are held to be reasonable on the ground that the telegraph company receives and transmits thousands of telegrams in the course of the time prescribed in the ²⁴³ rule, and that it would be impossible after this time for it to preserve its evidence so as to meet and defend actions brought against it for damages within the time allowed the sender by the statute of limitations to sue for the breach of a contract. The courts, in holding this rule to be a reasonable one, have virtually allowed it to abolish the statute of limitations by contract with the sender. The contracts thus made do not relieve the telegraph company from any part of its obligation. It is bound to the same care, diligence, and fidelity as the law requires it to exercise if no such contract had been made. All the contract requires is that the sender of a telegram should give notice of his claim for damages within the time agreed upon in the contract, so as to enable the company to ascertain the facts, and to preserve the same for its defense. This being true, it is difficult for me to see why the company cannot make the same contract in relation to a penalty imposed by law for a violation of its statutory duty, when the penalty is to be recovered by an individual, and not by the public. I admit that it cannot make a contract that will relieve it from the penalty, or that will relieve it from its breach of duty, either by omission or commission. But the contract under consideration does not undertake to do that. It simply means that if the company fails to discharge its duty to the sender as required of it by law, the sender agrees to present to it in writing his claim for the statutory penalty within sixty days after the message is filed with the company. It does not relieve the company of the penalty. The same obligation rests upon it to send or deliver the message "with impartiality and good faith and due diligence." If it fails to do so, and the sender complies with the stipulation to make his claim for the penalty within sixty days, the company is as much bound for the penalty as if the stipulation had not been made. It is no hardship upon ²⁴⁴ him. In these days of intelligence and rapid communication he can certainly ascertain, within a much shorter time than this, the failure on the part of the company to comply with the law. If he sends a message, he can, within a few hours or days at least, ascertain whether it was transmitted and delivered as

the statute requires. Why should he have more time to bring his action for a penalty of one hundred dollars than he would to bring it for damages involving one thousand dollars? It is said that the reason is that in the one case it is for a penalty, and in the other for damages; that the penalty implies public policy, and that the law forbids any one to contract contrary to that; that the object of the legislature was to quicken the diligence of these companies in the performance of their duties, and that this act is based upon public policy. I think that I have already shown that the company is not relieved from any of its duties by this stipulation in the contract; that the sender waives no right that the statute gives him by agreeing to the stipulation. All that he does waive is the general statute of limitations, in case he fails to give the notice. He agrees with the company to make a limitation of their own in lieu of the general statute prescribed for the breach of all contracts, if he fails to give the notice according to his agreement. Upon this subject, I think the case of the *Western Union Tel. Co. v. Jones*, 95 Ind. 228, 48 Am. Rep. 713, and the case of *Montgomery v. Western Union Tel. Co.*, 50 Mo. App. 591, cited by Mr. Justice Lumpkin in the opinion of the court in this case, are directly in point. I call particular attention to the reasoning of Chief Justice Elliott in Jones' case. While it is not binding upon us, the reasoning is very forcible, and is entitled to great weight.

Now as to the public policy of the act of 1887 which gives this right of action. It will be observed that the act declares that the penalty may be recovered by "either the sender of the dispatch or the person to whom sent ³⁴⁵ or directed, whichever may first sue." It does not give the right of action to the public. It does not provide that any part of the recovery shall go to the public, or to any portion of it. It gives the whole to the sender if he first brings his action. The suit under consideration was brought by the sender. I am free to admit that if the recovery, or a portion of it, went to the public, the sender could not agree to any stipulation which would deprive the public of its portion. The rule seems to be that where the public, or a portion thereof, are interested in a fine or penalty, the person or informer who brings the action cannot settle or compound with the defendant so as to deprive the public of its interest therein: 18 Am. & Eng. Ency. of Law, 281, and authorities cited. But where the penalty or fine goes alone to the in-

former or person who institutes the action therefor, he may settle or compound with the defendant, or withdraw his suit, or waive his right to recover the same. He being alone interested in the matter, may make any kind of agreement about it that he pleases. He is not compelled to sue; and if he does so, he can withdraw the suit or settle it by compromise. If he is entitled to receive half of the penalty, he can compromise with the defendant for his half, or he may release the defendant from his part thereof: *Warden etc. v. Cope*, 2 Ired. 44; *Haskins v. Newcomb*, 2 Johns. 405; *Western Union Tel. Co. v. Taylor*, 84 Ga. 408; *Western Union Tel. Co. v. Buchanan*, 35 Ind. 430; 9 Am. Rep. 744. If he can do this, what prevents him from stipulating in advance that if the defendant becomes liable to the penalty, he will give him notice thereof within sixty days? Section 10 of our code provides that "Laws made for the preservation of public order or good morals cannot be done away with or abrogated by any agreement; but a person may waive or renounce what the law has established in his favor when he does not thereby injure others or affect the public interest." The act of 1887 was not ³⁴⁶ enacted for the preservation of public order or good morals, but, as announced in the opinion of the majority of the court, was made for the purpose of quickening the diligence of these companies in the performance of their duties. The act of 1887, as before remarked, declares that the whole recovery shall go to the sender if he is the first to sue. His stipulating that he will give notice of the liability of the company for the penalty within sixty days affects only his own right to recover, and does not injure or affect the public interest in any manner. Under this section of the code this court held, in the case of *Simmons v. Anderson*, 56 Ga. 53, that Simmons, as head of a family, could waive his right to a homestead, although the constitution of the state expressly declared that he was entitled to one, and that it should not be subject to levy and sale. Section 2040 of the code provides that certain property of every debtor who is the head of a family shall be exempt from levy and sale, nor shall any valid lien be created thereon. Yet this court, in *Flanders v. Wells*, 61 Ga. 195, held that Wells could waive this exemption on property described in the section, and that it was subject to sale under a mortgage lien thereon which contained the waiver. These decisions were pronounced before the adoption of our present constitution, which allows a waiver of home-

stead and exemption. This constitutional provision allowing the homestead, and section 2040 providing for what is called the "pony homestead," were enacted to prevent families from being thrown out of house and home, and thus keep them from becoming charges upon the public. The public had therefore an indirect interest in seeing that each head of a family had a home. Yet, with this interest of the public, a waiver by the head of a family was held valid and binding. If it was not contrary to public policy to waive a homestead, which was enacted for the protection of the women and children ²⁴⁷ of the state and to prevent them from becoming charges on the public, how much less is it contrary to that policy to allow a sender of a telegram to stipulate that he will not hold the company liable for a penalty unless he gives it notice within sixty days from the filing of the message.

To repeat: he does not waive his right of action; he only waives the general limitation act, in case he fails to give notice of his claim for the penalty. If he gives the notice, he can still bring his action within the time prescribed by the statute of limitations. His doing so affects no one but himself. If he fails to give the notice which he stipulates to do, it is his own fault, and his failure injures no one but himself. In my opinion, the plaintiff in this case had the right to make the agreement in question. It was not contrary to public policy, and he should not be allowed to recover.

TELEGRAPH COMPANIES — STATUTORY PENALTY — DAMAGES — USE OF BLANKS.—The penalty imposed by statute for the failure of a telegraph company to transmit or deliver a message intrusted to it may be recovered without alleging or proving any actual damages. It is not a part of an entire demand for damages, and its recovery in a separate suit will not bar an action for damages for neglect or failure to transmit or deliver the same message: *Note to Western Union Tel. Co. v. Jones*, 30 Am. St. Rep. 582. A telegraph company cannot by contract evade a penal statutory liability for not transmitting or delivering messages correctly: *Western Union Tel. Co. v. Adams*, 87 Ind. 598; 44 Am. Rep. 776; monographic note to *Camp v. Western Union Tel. Co.*, 71 Am. Dec. 473. A condition printed on a telegraph blank, providing that the company cannot be held liable for damages unless the claim is presented in writing within sixty days is unreasonable and void: *Pacific Tel. Co. v. Underwood*, 37 Neb. 315; 40 Am. St. Rep. 490, and note showing cases to the contrary. That such a condition is valid, see *Wolf v. Western Union Tel. Co.*, 62 Pa. St. 83; 1 Am. Rep. 387; note to *Camp v. Western Union Tel. Co.*, 71 Am. Dec. 471; note to *Pacific Tel. Co. v. Underwood*, 40 Am. St. Rep. 494; *Hill v. Western Union Tel. Co.*, 85 Ga. 425; 21 Am. St. Rep. 166, and note; *Western Union Tel. Co. v. Dougherty*, 54 Ark. 221; 26 Am. St. Rep. 33, and note. A telegram, written upon a

printed form containing certain terms, and subscribed by the sender, amounts to an agreement on the part of the sender, according to most of the authorities, that the telegram shall be sent according to such terms: *Wolf v. Western Union Tel. Co.*, 62 Pa. St. 83; 1 Am. Rep. 387.

RUSHER v. STATE.

[94 GEORGIA, 363.]

CRIMINAL LAW — EVIDENCE OF INDEPENDENT FACTS — CONFESSIONS.—An independent fact directly connected with a crime as a whole being admissible in evidence, acts and declarations of the accused explanatory of it, or necessary to account for it, unless procured by criminal violence, may be received in evidence, whether such acts or declarations are voluntary or involuntary. They would, however, be valueless as a confession.

BURGLARY—DEFENDANT MAY BE REQUIRED TO POINT OUT STOLEN PROPERTY.—One arrested for burglary, where money has been stolen, may be ordered to point out the place where he has concealed it, and may be induced to do so by those having him in custody, either by operating on his hopes or his fears, provided they use no unlawful violence; and this does not contravene the constitutional provision that “no person shall be compelled to give testimony tending in any manner to criminate himself.”

CRIMINAL LAW—ARREST—SEARCH OF PERSON FOR EVIDENCE OF CRIMINALITY.—A person while in custody on a criminal charge may be subjected to a personal search and examination against his will, in order to discover upon him evidence of his criminality.

BURGLARY—DISCOVERY OF PROPERTY—PRISONER'S ACTS AND DECLARATIONS.—In a prosecution for burglary, where money was stolen, the independent fact that the money was found soon afterward is admissible in evidence; and the prisoner's acts and declarations necessary to account for the discovery and to explain the manner of it, if not obtained by criminal violence, are also admissible for this purpose, but not as a confession of guilt

INDICTMENT for burglary.

F. H. Colley and M. P. Reese, for the plaintiff in error.

W. M. Howard, solicitor general, for the defendant in error.

364 BLECKLEY, C. J. The indictment was for burglary, and Rusher, one of the accused, was found guilty of larceny from the house. Money was stolen from the store of J. H. Jones & Co., in Elberton. It was stolen at night, and during the night most of it was found concealed in the grass and somewhat buried in the ground, a few hundred yards from the store. The circumstances attending the finding were detailed by the witness J. T. Heard, a part of whose testi-

mony, according to the brief in the record, was as follows "Mr. Chedel, Mr. Boyd, my brother, Jim Rusher, Cas Butler, and myself were present when this money was found. The defendant Jim Rusher was present. He kept telling us we would find the money if we would keep looking. He said it was right there near by, and if we would keep looking we would find it; and we found it where he said it was. He said he would go with us where the money was found. We had him under arrest. He could not have gotten away. We carried him down there with us. . . . The defendant said he would take us down there; he carried us; we did not know where to go; he was the man to show us where to go."

Q. "You gentlemen had used some coercion on him, had n't you? A. I suppose you might call it that." The act of the accused ³⁶⁵ in conducting the witness and his associates to the place where the money was found, and his declarations while the search was in progress to "keep looking for the money up by the fence; it is there somewhere," were objected to as incompetent evidence, on the ground that the act was done and the declarations were made under coercion. The declarations do not appear in the brief of evidence precisely as they are recited in the motion for a new trial, but this variance may be disregarded or treated as immaterial. They were not offered and received as admissions or confessions of guilt, but as information which guided the search and conduced to the discovery of the money. Nothing said by the accused either affirmed or denied guilt, or was an admission that he was the person by whom the money was concealed. All he said was confirmed by the physical fact of the presence of the money at the place designated, and by finding it there through the search conducted as he directed.

1. The independent fact that the money was found was certainly admissible in evidence, and there can be no doubt that it has been a rule of law long and well established that not only such a fact, but acts and declarations of the accused, in so far as they explain and are necessary to account for it, whether the acts or declarations be voluntary or involuntary, may be received for this purpose: 1 Phillips on Evidence, 116; 2 Starkie on Evidence, 37, 38; Roscoe's Criminal Evidence, 51; 1 Greenleaf on Evidence, sec. 231; Wharton's Criminal Evidence, sec. 678; 3 Am. & Eng. Ency. of Law, 481; *Jones v. State*, 75 Ga. 825; *Daniels v. State*, 78 Ga. 98; 6 Am. St. Rep. 238. Such evidence, when admitted for this

sole purpose, is not treated as proving a confession, but as being a part of the *res gestæ* of the independent evidentiary fact. If what the accused did and said was the result of coercion, however mild, it would have been inadmissible, had not the search which was made for the money resulted ~~see~~ in its discovery. The discovery being a material and relevant fact, what would contribute to account for and explain it would be relevant also, not for its own sake but for its explanatory function and value. It may be that the whole of the evidence would be inadmissible according to the true meaning and spirit of the rule, if it appeared that criminal violence, such as whipping, was used in coercing the act or extorting the speech which led to the discovery. The fruits of physical torture as distinguished from those of mere fear, it would seem, ought to be unavailing. The honor and decency of the law would seem to be involved in rejecting them. The law ought to hold out no encouragement to violent and lawless men to commit crime for the sake of detecting a previous crime and bringing the offender to punishment. The law should never suffer itself to become an enemy or antagonist to its own reign. The multiplication of crimes as a remedy for crime would be a very absurd and disastrous public policy, and we think courts should not lend themselves to the advancement of any such policy, unless they are compelled to do so by statute or some authority equally obligatory.

The constitutional provision that "no person shall be compelled to give testimony tending in any manner to criminate himself" (Code, sec. 4998) does not displace or repeal the rule of law which we have been considering. It is manifest that the letter of the provision does not have that effect, for the subject matter of the common-law rule is not the giving of testimony by the accused, but the admissibility in evidence of facts, acts and declarations known to and detailed by other witnesses. It is contended, however, that the spirit of the constitutional provision extends to anything which a person under accusation, or afterward accused, is coerced to do or say out of court before trial or in court during the trial.

There certainly is some authority tending to support this position. Taken in its full breadth, we deem the contention unsound. So far as we know, there is nothing in our own reports which goes to the extent of excluding the evidence where a substantive pre-existing physical fact bearing directly on the fruits of the crime has been discovered by means of exciting

hope or fear. In *Day v. State*, 63 Ga. 667, the discovery made was that the prisoner's shoe fitted a certain track. In the present case, physical facts previously existing became known; the discovery was of existing facts, all of which had been voluntarily created by the accused or some one else as a sequel to the corpus delicti. Knowledge by competent witnesses, however acquired, so that it be real and accurate, is of some evidentiary value, irrespective of the means of acquisition, and there would seem to be no injustice against any one in using it in evidence, unless it was acquired by criminal violence, or unless some rule of public policy would be violated by so using it, as in the case of confidential communications to counsel, etc. It is obvious that to compel a person while on trial to perform some act or make some prejudicial discovery in the presence of the court and jury, as was done in *Blackwell v. State*, 67 Ga. 76; 44 Am. Rep. 717, is much more in the nature of compelling him to give testimony against himself, than is coercing him to do or say something out of court which leads to the knowledge on the part of witnesses of some independent fact directly connected with the criminal transaction as a whole, and which has an evidentiary significance of its own, without reference to the means or method of discovery. It has been held that a person while in custody may be subjected to a personal search and examination against his will, in order to discover upon him evidences of his criminality: *Woolfolk v. State*, 81 Ga. 551. And see *Franklin v. State*, 69 Ga. 36; 47 Am. Rep. 748; *Drake v. State*, 75 Ga. 413. ²⁶⁸ If this may be done, it would seem no less allowable for those having him in custody to order him to point out the place where he has concealed stolen money or property, and induce him to do so either by operating on his hopes or his fears, provided they use no unlawful violence. It must be remembered that confessions as such are equally inadmissible when they are the fruits of hope as when they are the product of fear; and certainly it could not be successfully contended in this case that if the discovery of the stolen money had been made by exciting hope of impunity, this would have been any impediment to proving the discovery and how it was brought about, including the acts and sayings of the accused.

What coercion was used we are not informed. As nothing to the contrary appears, the presumption ought to be that there was no use of personal violence or anything that would

amount to criminal conduct. Our conclusion coincides with that of the trial court. We think the evidence was admissible. In *Byrd v. State*, 68 Ga. 661, no property was found concealed, and, apart from the confession, there was no certainty either that any had been stolen, or, if any stolen, that the article produced by the accused was part of it.

2. The motion for a new trial recites that the objection to the evidence of the declarations made by the accused, as above set out, was accompanied with the announcement by counsel for the accused that they wished to interrogate the state's witness to show that the accused had been whipped; but there is no trace of this form of coercion in any of the evidence, or of any particular form whatever. The right to interrogate the state's witness on this subject, though not denied, was not exercised. We may infer that when the state's counsel declared there was no purpose to introduce confessions as such, the opposite counsel, without perhaps ²⁶⁹ conceding the admissibility of the evidence, concluded not to resist its introduction. At all events, no further objection seems to have been made, and the theory of whipping was left wholly unsupported. It has, therefore, no relevancy to the merits of the objection.

3. The money found was sufficiently identified as money which disappeared from the store when the theft was committed. The sum was a little less than the amount stolen, and the identification was more by the character of the money with reference to the material of which it was composed than by the particular characteristics of any specific piece or pieces; but, taking all the circumstances into consideration, the jury could have had no moral doubt of the identity of the money, and there was no deficiency of the evidence in any respect. The verdict was warranted and the refusal of a new trial was correct.

Judgment affirmed. —

EXTRANEOUS FACTS ASCERTAINED THROUGH INADMISSIBLE CONFESSION.— If one accused of crime in making an involuntary confession makes statements of extraneous facts, and, in consequence of the information thus obtained from him, the property stolen or any other material fact is discovered, it may be shown that the discovery was made conformably with such information. It may be shown that the prisoner said that the thing would be found by searching a particular place, and to prove that it was so found, but not that the prisoner confessed that he had concealed it there; See monographic note to *Daniels v. State*, 6 Am. St. Rep. 250, on admission of confessions in evidence.

ARREST—SEARCH OF PRISONER FOR EVIDENCE OF GUILT.—A coroner, sheriff, or policeman, when he arrests a person charged with crime, has a right to search him for evidence of his guilt; and if, in the prosecution of such search, it becomes necessary to remove the clothing of the person arrested, the officer has the right to do so; and the testimony of the officer, or of those who were present at the time of the search, as to such discoveries, is admissible: *Woolfolk v. State*, 81 Ga. 551; *Franklin v. State*, 69 Ga. 36; 47 Am. Rep. 748. Such a search may also be made as a measure of preventive justice: *Spalding v. Preston*, 21 Vt. 9; 50 Am. Dec. 68; *Closson v. Morrison*, 47 N. H. 482; 93 Am. Dec. 459. The prisoner, however, cannot be compelled, against his consent, to make profert of his amputated leg, or to put his foot in a shoe-track, for the purpose of using the information thus gained as evidence against him in a criminal prosecution. This would violate the constitutional provision that no person shall be compelled to give testimony tending in any manner to criminate himself: *Blackwell v. State*, 67 Ga. 76; 44 Am. Rep. 717.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

WHITCOMB v. RODMAN.

[156 ILLINOIS, 116.]

WILLS—CONSTRUCTION.—THE INTENT of the testator must govern in the construction of his will, if not contrary to some positive rule of law, although in giving effect to it some words must be rejected or so restrained in their application as materially to change the literal meaning of the particular sentence.

WILLS.—IT IS PRESUMED that a person in making and publishing his will intends to dispose of his whole estate.

WILLS—EXTRINSIC EVIDENCE.—IN CASE OF LATENT AMBIGUITY in a will, extrinsic evidence may be resorted to, not for the purpose of contradicting or adding to the will, but to determine the existence or non-existence of such ambiguity, and to enable the court to look upon the will in the light of the facts and circumstances surrounding the testator at the time of its execution.

WILLS—MISDESCRIPTION OF ESTATE.—If a testator misdescribes his estate as being in different localities from the fact, putting one part in the locality of another, or describing land which he never owned, and sufficient appears upon the face of the will, as applied to the subject matter, to show that such misdescription is a mere mistake, it will not defeat the obvious intention of the testator.

WILLS—MISDESCRIPTION.—While words cannot be added to a will, yet, in arriving at the intention of the testator, so much as is false in the description of the land devised, may be stricken out, provided enough remains to identify the premises intended to be devised.

Kerrick, Lucas & Spencer, for the appellants.

Benjamin & Morrissey, for the appellees.

120 CRAIG, J. In the construction of a will the important question always is, What was the intention of the testator? As was well said by Chief Justice Marshall in *Finlay v. King's Lessee*, 8 Pet. 346: "The intent of the testator is 121

the cardinal rule in the construction of wills, and if that intent can be clearly perceived, and is not contrary to some positive rule of law, it must prevail, although in giving effect to it some words should be rejected, or so restrained in their application as materially to change the literal meaning of the particular sentence": See, also, *Decker v. Decker*, 121 Ill. 341.

It will be presumed that a person, when he makes and publishes a will, intends to dispose of his whole estate, unless the presumption is rebutted by its provisions or evidence to the contrary: *Higgins v. Dwen*, 100 Ill. 554; *Woman's Union Missionary Society v. Mead*, 131 Ill. 338. Upon an examination of the will in this case nothing will be found tending in the least to establish an intention on the part of the testator to leave any portion of his property to descend as intestate estate. On the other hand, in view of the property owned by the testator, it is manifest from the language of the will that the testator intended to devise his entire estate. When the will was executed, and at the time of the testator's death, he owned one hundred and eighty acres of land, and no more. Of this the testator, as is manifest from the will, attempted to devise one hundred acres to his son Joseph, forty acres to his son Edward, and forty acres to his daughter Ann Eliza Boyce, making one hundred and eighty acres—all the land possessed by the testator. But while it is manifest that the testator intended to dispose of all the lands he possessed, yet the language of the will as found in the second and third clauses, if construed literally, as written, will defeat the plain intention of the testator. Shall that be done, or shall resort be had to extrinsic evidence to ascertain the real intent of the testator?

In the consideration of a question of this character in *Decker v. Decker*, 121 Ill. 341, it was said: "While the general rule undoubtedly is that the intention of the testator is to be gathered from an inspection and consideration of the will, and from no other source, in case of latent ambiguity ¹²² courts do, and must, listen to extrinsic evidence—not for the purpose of contradicting or adding to the terms of the will, . . . but for the purpose of determining the existence or nonexistence of latent ambiguity, . . . and for the further purpose of enabling the court to look upon the will in the light of the facts and circumstances surrounding the testator at the time the will was made, whereby to determine the intention of the testator."

Wigram on Extrinsic Evidence in the Interpretation of Wills, after citing cases to prove that extrinsic evidence may be resorted to, says "they might be multiplied without end," and adds: "They appear to justify the conclusion that every claimant under a will has a right to require that a court of construction, in the execution of its office, shall, by means of extrinsic evidence, place itself in the situation of the testator, the meaning of whose language it is called upon to declare": Quoted with approval in *Woman's Union Missionary Society v. Mead*, 131 Ill. 362.

In *Patch v. White*, 117 U. S. 210, it is said: "A latent ambiguity in a will, which may be removed by extrinsic evidence, may arise: 1. Either when it names a person as the object of a gift or a thing as the subject of it, and there are two persons or things that answer such name or description; or 2. When the will contains a misdescription of the object or subject, as where there is no such person or thing in existence, or, if in existence, the person is not the one intended or the thing does not belong to the testator." After citing cases the court concludes: "By merely striking out the words 'six' and 'three' from the description of the will, as not applicable (unless interchanged) to any lot which the testator owned, . . . the residue of the description, in view of the context, so exactly applies to the lot in question that we have no hesitation in saying that it was lawfully devised to Henry Walker."

¹²³ In *Moreland v. Brady*, 8 Or. 303, 34 Am. Rep. 581, in considering a question of this character, the court said: "We apprehend there can be no question of the admissibility of extraneous oral evidence to show the state and extent of the testator's property, in order to place the court in the same position the testator was in at the time he made the will in question. This, we think, is unquestionably the rule established by the decided cases. This being done, it appears that the testator had no such lots as those described as lots 1 and 2, in the particular block named. This renders it certain that the lots named were erroneous, and the words describing them can have no possible operation, and must be rejected."

In *Decker v. Decker*, 121 Ill. 341, by the terms of the will the testator devised twenty acres off the west half of the northeast quarter of the northeast quarter of section 33, township 18 north, range 11 west. The evidence, however,

showed that the testator never owned the northeast quarter of the northeast quarter of section 33, or any part of it, but he did own the northwest quarter of the northeast quarter of the section. It was held that there was a latent ambiguity in the devise, the descriptive words of the land devised being in part false, and that the false description might be stricken out and the devise sustained as embracing the land owned by the testator.

Keeping in view the foregoing rules of construction, it seems plain that the testator did not intend to leave the two forty-acre tracts in the northeast quarter of section 22 to descend as intestate estate. He, in plain words, devised to Joseph one hundred acres of land, and then follows with a particular description—that is, sixty acres off of the west side of the southeast quarter of section 22, and forty acres, being the northwest quarter of the southeast quarter of section 22. Thereby the forty-acre tract was made to overlap the north thirty acres of the sixty acres which were to be a part of the one hundred ¹²⁴ acres devised to Joseph. The east ten acres of the forty devised to Joseph the testator never owned, so that the general purpose to devise to Joseph one hundred acres would be defeated, and he would take but sixty acres under the devise, and the adjoining forty acres on the north of the sixty acres be left undevised, and the general intent for the disposition of the entire tract thus be defeated. It is also apparent that the purpose of the testator, as expressed in the will, was to give his son, Edward L. Rodman, forty acres of land. Indeed, the will says, "To my son, Edward L. Rodman, I will and bequeath forty acres of land." The land is then described as the northeast quarter of the southeast quarter of section 22—land which the testator never owned. But he did own forty acres lying directly north of the forty-acre tract described, which was known as the southeast quarter of the northeast quarter of section 22. If the will is to be construed as contended for by plaintiffs in error, the devise of forty acres of land to Edward will be defeated entirely, and the intention of the testator will be disregarded. If, therefore, by any of the recognized rules of construction the will may be so construed as to give the language of the testator effect, and thus carry out the evident intention not only to dispose of his entire estate, but to give to his sons, Joseph and Edward, the land intended to be devised to them, it is the duty of the court to adopt that construction.

Redfield on Wills, page 469, says: "Where the testator misdescribes his estate, as being in different localities from the fact, putting one estate in the locality of another, and vice versa, it was held that where sufficient appeared upon the face of the will, as applied to the subject matter, to show that such misdescription was a mere mistake, either in the testator or the person who drew up the will, that it would not have the effect to defeat the obvious intention of the testator."

¹²⁵ While words cannot be added to a will, yet in arriving at the intention of the testator, as has been shown by the authorities, so much as is false in the description of the premises devised may be stricken out, and, after striking out the false description, if enough remains to identify the premises intended to be devised, the will may be read and construed with the false words eliminated therefrom. Adopting that rule here, the second and third clauses will read as follows:

"*Second*—To my son, Joseph L. Rodman, I will and bequeath one hundred acres of land (100)—sixty acres (60) off of the west side of the southeast quarter of section twenty-two (22), forty acres (40) being the quarter of the quarter of section twenty-two (22)."

"*Third*—To my son, Edward L. Rodman, I will and bequeath forty acres of land, being the quarter of the quarter of section twenty-two (22)."

Bearing in mind that the testator owned two forty-acre tracts in the northeast quarter of section 22, and reading the two clauses of the will in the light of surrounding circumstances, we think all difficulty is removed in regard to the lands devised by these two provisions of the will. The testator, owning two quarters of a quarter of section 22, devised one-quarter to his son Joseph and the other quarter to his son Edward, and the two sons took and held the two tracts undivided.

The circuit court, in its decree, held that the two forty-acre tracts were devised by the will, the southwest forty to Joseph and the southeast forty to Edward. In this respect we think the court erred, but as the error was one which did not affect plaintiffs in error, they having no interest whatever in the premises, the error was one which did no harm, and hence no ground for reversing the decree.

The decree of the circuit court will be affirmed.

WILLS—CONSTRUCTION—INTENT OF TESTATOR.—The intention of the testator must control in the interpretation of a will: *Ducker v. Burnham*, 146 Ill. 9; 37 Am. St. Rep. 135; *Watkins v. Snadon*, 93 Ky. 501; 40 Am. St. Rep. 203, and note; *Murphy v. Carlin*, 113 Mo. 112; 35 Am. St. Rep. 699, and note.

WILLS—EXTRINSIC EVIDENCE TO AID IN CONSTRUCTION OF.—When from the terms of a will the intention of the testator cannot be ascertained recourse must be had to all circumstances which may aid in the discovery of his intention: *Succession of Ahrenberg*, 21 La. An. 280; 99 Am. Dec. 729. Extrinsic evidence is admissible to aid in the exposition of a will only in those cases where, from some ambiguity or obscurity, a difficulty arises in applying the words of the will to the subject matter of a devise or legacy: *In the Matter of Wells*, 113 N. Y. 396; 10 Am. St. Rep. 457, and note; *Sturges v. Work*, 122 Ind. 134; 17 Am. St. Rep. 349, and note. This question is fully discussed in the notes to *White v. Holland*, 44 Am. St. Rep. 89, *Heidenheimer v. Bauman*, 31 Am. St. Rep. 38, and especially the extended note to *Goode v. Goode*, 66 Am. Dec. 636.

WILLS—STRIKING OUT MISDESCRIPTION.—This question is discussed at length in the extended note to *Kurtz v. Hibner*, 8 Am. Rep. 669.

GUIGNON v. UNION TRUST COMPANY.

[156 ILLINOIS, 135.]

CONFLICT OF LAWS—DAMAGES ON PROTESTED NOTE.—If a note secured by mortgage on lands in one state is made and is payable in another, it is governed by the law of that state allowing damages upon protested notes.

MORTGAGE—TRUSTEE—COMPENSATION FOR FORECLOSURE.—Under a deed of trust providing that the trustee therein shall be entitled to reasonable compensation for all services rendered in the execution of the trust, he may, upon foreclosure, be allowed reasonable remuneration for his services and reasonable counsel fees out of the proceeds of the sale.

BILL to foreclose a mortgage. From the opinion of the appellate court it appears that "this was a suit brought by the Union Trust Company, trustee, William H. Alley, John B. Logan, Charles A. Mair, and the executors of the last will of Josephus Collett, deceased, against Emile S. Guignon, of St. Louis, Missouri, and others, to foreclose a mortgage executed by Guignon to secure the purchase money of the lands in said mortgage described, amounting to \$60,000, evidenced by his six principal promissory notes, for \$6,666.66½ each, and notes for the interest thereon, in favor of said Collett, and three principal notes for the same sum each, and notes for the interest thereon, in favor of Emily C. Lyon. Three of said nine principal notes matured March 18, 1892, three March 18, 1893, and the remaining three March 18, 1894.

The principal and interest notes maturing March 18, 1892, and the interest notes maturing September 18, 1892, were paid at maturity. Five of the unpaid Collett notes were undisposed of when he died, and were held by his executors, and the remaining unpaid five notes he sold to complainant Alley, two of which, maturing March 18, 1893, were protested by Scudder, notary. Emily C. Lyon sold the five unpaid notes payable to her to complainant Mair, before maturity. The principal note due March 18, 1893, and the note for interest thereon due on same date for \$400, were protested by Carr, notary, and complainant Lyon, after the protest, bought them of Mair, because Lyon had guaranteed their payment. The remaining three of said unpaid notes are held and owned by Mair. Damages of four per cent on the amount of the protested notes were asked for in the bill by virtue of the provisions of the Missouri statute, set out at length therein. The mortgage provides that compensation shall be made to the trustee for all services rendered, and also that the mortgagor agreed to pay all expenses, fees, and charges of the said trust company in executing the trust. The bill also prays for an accounting, and payment of the amount which, under the bill and mortgage made part thereof, may be found due upon an account stated.

"The cause was heard by the court upon the bill, answer, and evidence. All the defendants except August Gehner appearing (and as to him the court found it had jurisdiction), and he having failed to answer, the bill was taken as confessed by him. The court found all the material allegations of the bill were true, setting out the findings specifically, and also that the Union Trust Company, complainant, was entitled to \$2,650 as a reasonable compensation for its services and the necessary expenses incurred by it in and about the execution of the trust, and referred the cause to the master to compute the amount due each of the complainants, in view of the findings and the several notes which are part of the record; and the decree then further recites, that, on the 21st of December, the master presented his report, finding \$6,986.83 due complainant Mair, \$7,720.33½ due complainant Lyon, \$14,707.16 due complainant Alley, and \$14,424.50 to complainant's executors, Jump and Bogart, and approves said report, and thereupon decrees that defendant Emile S. Guignon, within thirty-five days from date of decree, pay to each of said parties the sum so due to each, respectively, with five

per cent interest from date of decree upon all except said sum of \$2,650, which shall be taxed and included as costs. Decree then provides for sale of mortgaged premises in case of default, subject to redemption. Defendants appealed and bring up the record to this court.

"It is first objected that the master improperly allowed interest, in his computation upon the three principal notes, for \$6,666.66 $\frac{2}{3}$ each, maturing March 18, 1894, from September 18, 1893, to December 18, 1893—the date of decree. These three notes, by their terms, were not due until March 18, 1894, but, because of the default in not paying the notes due March 18, 1893, became due, together with accrued interest, by the terms of the mortgage, if the holders elected to declare them due, which they did. The interest notes last matured, for the interest on these three principal notes became due March 18, 1893, and were allowed in the computation, but the accruing interest on the principal from that date up to the date of the decree was also equitably due the holders of said notes, and was properly included in the computation made by the master. It is true, interest notes maturing March 18, 1894, were given, which would include and cover interest accruing for the period mentioned; but these notes were not figured in said computation, although offered in evidence, and each contained this clause: 'This is an interest note, subject to reduction or total defeasance, depending on payment on principal notes.' With such notice on the face of each it is quite improbable they could be sold to a purchaser for value, and, if negotiated, there being nothing due thereon above the accruing interest so computed and allowed, no recovery could be had.

"It is also objected that the court erroneously allowed four per cent damages to complainants Alley and Lyon on protested notes, claimed in the bill to be due by virtue of the statute of Missouri. The mortgage notes held by Alley so protested were payable to Josephus Collett, one for \$6,666.66 $\frac{2}{3}$, the other for \$400, both due March 18, 1893, protested March 21, 1893, by William H. Scudder, Jr., protest signed William H. Scudder, sworn to by William H. Scudder, Jr., and it is insisted that the variance in the name of the notary is fatal, and that William H. Scudder, Jr., named in the body, and who swears to it, may be a different person from the William H. Scudder who signs it. In our judgment the omission of the addition 'Jr.,' in the one instance, does not justify the

inference that two different persons officiated in the protest—one making it and swearing to the fact, the other signing the certificate. William H. Scudder and William H. Scudder, Jr., was evidently one and the same person, and the court properly so held.

“It is next insisted the protests are insufficient to entitle the complainants, owners of the protested paper, to recover the four per cent damages allowed by the Missouri statute, for the reason no demand was made on Guignon, nor was any notice given him of the dishonor of the paper. The payment was demanded at the office of the Union Trust Company in St. Louis, which was the place the notes were, by the terms thereof, to be paid. Other demand upon the maker was not required; nor was he entitled to notice of dishonor. He was a primary debtor—not an indorser: 2 Daniell’s Negotiable Instruments, 1st ed., sec. 995, p. 47; *Donnell v. Louis Co. Sav. Bank*, 80 Mo. 172.

“It is next insisted the notes and mortgage are Illinois contracts, and are not within the operation of the Missouri statute allowing damages of four per cent upon the principal sum of a note duly presented for payment and protested for nonpayment. The mortgage recites that Emile S. Guignon, the mortgagor, of St. Louis, Missouri, mortgages and warrants to the Union Trust Company of St. Louis, Missouri, trustee, the lands described in the bill. All the notes were dated, executed, and made payable at the office of said trust company in St. Louis, hence the place fixed for the performance of the contracts was St. Louis, and the notes are to be held Missouri contracts, and subject to the provisions of said statute: *Land Co. v. Rhodes*, 54 Mo. App. 129.

“It is further contended that the notes protested were indorsed by the payee in blank, and held by other parties at time of protest, not complainants in the bill, and who were then prima facie owners thereof, and therefore they, and not complainants Lyon and Alley, were alone entitled to the four per cent damages. The evidence of Lyon and Alley establishes the fact of their ownership of all of said notes as alleged in the bill, and they, as such, had the right to recover the damages allowed them, respectively, for nonpayment and protest. The indorsement in blank was not intended to, and did not, vest the title of said protested notes, or either of them, in the Union Trust Company or State Bank of St. Louis.

“It is also insisted that the protests of the two Lyon notes,

protested by Carr, are void, because the certificates of protest are not verified by his affidavit. The record shows they were so verified. And counsel for appellant are also mistaken in their statement that it is not alleged in the bill that the notes were presented at the place where they were to be paid.

"It is further objected that as the notes were due March 18th, and the demand was made for payment on March 21st and protested on same day, and three days' grace being allowed by the law, the protest was premature. In each certificate of protest it is recited that the notary presented the note during business hours at the office of the Union Trust Company, St. Louis, Missouri, the place of payment, on March 21, 1893, and demanded payment, which the maker refused. In *Cook v. Renick*, 19 Ill. 598, it was held that, in the absence of statutory provision to the contrary, bill presented for payment on last day of grace was presented in proper time. In the case of *Commercial Bank v. Barksdale*, 36 Mo. 573, it is said: 'It seems to be clearly established by the general current of authority that the protest must be made on the same day the presentment and demand is made.' We think, under the proof, the demand was made at the proper time, and the protest on the same day was not premature."

The ruling of the appellate court on the question of the allowance of attorney fees and compensation to the trustee sufficiently appears from the following opinion.

Spencer & Van Hoorebeks, for the appellants.

A. & J. F. Lee, and C. W. Thomas, for the appellees.

144 CRAIG, J. We concur in the judgment of the appellate court, and it will only be necessary to add a few words in addition to what is said in the opinion of that court.

It is insisted in the argument that the appellate court erred in affirming that part of the decree wherein four per cent damages were allowed on the protest of a note, as provided for by the statute of Missouri, as construed by the supreme court of that state in *Clark v. Schneider*, 17 Mo. 296, and other cases. In support of this position reliance is placed on section 8, chapter 74, page 835, of Hurd's Statutes, viz: "When any written contract, wherever payable, shall be made in this state, or between citizens or corporations of this state, or a citizen or corporation of this state and a citizen or corporation of any other state, territory, or country (or shall be secured by mortgage or trust deed on lands in this state),

such contract may bear any rate of interest allowed by law to be taken or contracted for by persons or corporations in this state, or which is or may be allowed by law on any contract for money due or owing in this state." We do not think this section of the statute controls the question involved. Here the contract was made in Missouri, and was payable in that state, and the right to recover the damages on the protest of the note depends upon whether the notes are to be construed according to the laws of Illinois or the laws of Missouri. If the latter, then the damages were properly allowed.

In 1 Jones on Mortgages, edition of 1894, the author says: "The validity of a contract secured by a mortgage made in one state upon lands in another state depends, so far as the usury laws affect it, upon the question, By the law of which state is the contract itself governed? If ¹⁴⁵ the loan is to be repaid in the state where it is made, the contract will be governed by the laws of that state, even when secured by mortgage of land situate in another state": Sec. 657. "The authorities, generally, do not regard the circumstance that the loan is secured by mortgage, in determining whether it is usurious": Sec. 660. "But as to the form and validity of the mortgage deed as a conveyance, the law of the place where the land is situated must always govern": Sec. 662.

In 1 Daniell on Negotiable Instruments, edition of 1891, page 930, the author says: "The rate of interest which a bill of exchange or promissory note bears when no rate is specified, and the question whether or not it shall bear interest, are both determinable by the law of the place where it is expressly or impliedly to be paid": Sec. 918. "The rule applicable to interest applies as well to what is distinctly termed 'damages.' Each party, drawer, indorser, and acceptor is liable according to the place where the bill is drawn, indorsed, or accepted": Sec. 921.

Sections 1 and 2, chapter 98, of Hurd's Statutes, entitled "Negotiable Instruments," provide for the payment of damages on bills of exchange protested for nonpayment in certain specified cases. This statute would seem to indicate that the allowance of damages to the holder of protested commercial paper was not contrary to the policy of the state.

Under the authorities we are of opinion that the laws of Missouri, where the paper was payable, must control.

Testimony was introduced before the master showing what the services of the solicitor were reasonably worth in the case,

and from the evidence the master reported as follows: "The master further reports from the evidence that a reasonable sum for expenses for attorneys for the trustee is \$2,250." The evidence before the master also showed that the services of the Union Trust Company were reasonably worth \$400. The report of the master was approved, and the court, in its decree, ¹⁴⁶ found "that the Union Trust Company is entitled to \$2,650 as a reasonable compensation for its services, and the necessary expenses incurred by it, in and about the execution of the said trust cause referred to master for computation." Upon this finding the court, among other things, decreed "that out of the proceeds of the sale the master in chancery pay, first, the costs of this suit and of said sale, including \$2,650 to said Union Trust Company." As has been seen, the decree was affirmed in the appellate court, and it is insisted that the decision approving the allowance of \$2,650 to the Union Trust Company is erroneous.

It will be observed that the allowance of \$2,650 embraced two items: 1. \$400 for the services of the Union Trust Company; 2. \$2,250 to cover reasonable solicitor's fees for foreclosing the mortgage. We will consider the two items separately.

As respects the first the deed of trust contains this provision: "It is agreed that said trustee, under this indenture, shall be entitled to a reasonable compensation for all services rendered thereunder, to be paid by the said mortgagor." Here is an express agreement by the mortgagor to pay the trustee compensation for his services, and the evidence shows that the compensation was worth \$400, the amount allowed by the court, and we see no reason why under the agreement and evidence, the allowance should be disturbed.

Appellants' attorneys have cited and rely on *Heffron v. Gage*, 149 Ill. 182, as an authority sustaining their position. An examination of the decision in that case will show that it has no bearing on the question. In that case the circuit court allowed a trustee's fee and also solicitors' fees, but on appeal to the appellate court the decree was set aside as to trustee's fee and affirmed in all other respects. The defendants appealed to this court and we affirmed the judgment of the appellate court. But the trustee who was defeated in the appellate ¹⁴⁷ court assigned no cross-errors, and the ruling of the appellate court as to his fee was not called in question, and nothing was decided or said on that subject.

We now come to the question as to the amount allowed the Union Trust Company for solicitor's fees. The mortgage contains a provision for releasing portions of the mortgaged property upon certain payments being made, and then follows this clause: "The mortgagor agrees to pay all expenses of such releases, as well as all other fees and charges of the said trust company in executing this trust." Here the Union Trust Company, the trustee named in the mortgage, was called upon by the holders of the mortgage indebtedness to foreclose the mortgage. In order to do this it was necessary for it to employ solicitors—men skilled in that department of the law. The company was not a lawyer, and could not, without the assistance of a solicitor, foreclose the mortgage, and whatever expense the company incurred in foreclosing the mortgage, reasonable in amount, would, in our opinion, fall within the clause of the mortgage *supra*, providing for fees and charges.

Objection is made to the amount allowed. The amount of the mortgage foreclosed was over \$43,000. The mortgaged lands had been sold by the mortgagor, and in foreclosing care and skill were required in order to secure a good title, under the decree, in case no redemption was made. Under all the circumstances we are not inclined to hold that the amount allowed was too large.

The judgment of the appellate court will be affirmed.

NEGOTIABLE INSTRUMENTS—PROTEST—DAMAGES—CONFLICT OF LAWS.—Wrongfully protesting a note before it is due gives a right to nominal damages only: *Hirshfield v. Fort Worth Nat. Bank*, 83 Tex. 452; 29 Am. St. Rep. 660. The form and necessity for protest of a note is governed by the *lex loci contractus*: Extended note to *Dupre v. Richard*, 43 Am. Dec. 217.

TRUSTEES—COMPENSATION OF.—This subject is discussed at length in the extended note to *Gibson's case*, 17 Am. Dec. 266.

AM. ST. REP., VOL. XLVII.—13

MOSES v. LOOMIS.

[156 ILLINOIS, 392.]

APPEAL—BILL OF EXCEPTIONS—IDENTIFICATION OF EXHIBITS.—Exhibits recited in a bill of exceptions as having been received in evidence and marked with certain marks are sufficiently identified by such marks without any recital that they are the instruments offered in evidence, provided that the bill certifies that the evidence therein set forth is all that was offered at the trial, and no other exhibits are found so marked.

LANDLORD AND TENANT—WAIVER OF FORFEITURE OF LEASE.—The right to declare a forfeiture secured by covenant in a lease may be waived by parol.

LANDLORD AND TENANT—ESTOPPEL TO ENFORCE FORFEITURE.—A landlord, who by his words and conduct causes his tenants to believe that he does not intend to enforce a forfeiture provided for in the lease is estopped to avail himself of the forfeiture after his tenants have acted under such belief.

Straus & Bruggemeyer, for the appellant.

Longenecker & Jampolis, for the appellees.

393 BAILEY, J. This was an action of forcible detainer, commenced before a justice of the peace by Albert Moses against D. J. Loomis, E. W. Stevens, and R. S. Hopkins, to recover possession of certain premises in the city of Chicago which the plaintiff had previously leased to Loomis & Stevens, and a portion of which had been underlet by them to Hopkins. Before the justice of the peace the plaintiff recovered judgment against all the defendants, but, on appeal by the defendants to the circuit court, a trial was had before a jury, resulting in a verdict and judgment in their favor. On appeal by the plaintiff to the appellate court that judgment was affirmed, and this appeal is from the judgment of affirmance.

A preliminary question arises out of the contention by the appellees that, as the bill of exceptions is framed, the written lease from the plaintiff to Loomis & Stevens, and the written demand for possession served on them, are not so identified as to enable an appellate court to consider them, and consequently that, so far as appears, there was an entire want of evidence upon which a recovery by the plaintiff could be based. It appears from the opinion of the appellate court that this contention was sustained by that court, and that the judgment was affirmed on that ground alone. Our examination of the bill of exceptions brings us to a different conclusion. That document recites that the plaintiff produced an instrument which he described as a lease from him-

self to Loomis & Stevens, and offered it in evidence, and it is then recited that "said lease was admitted in evidence and marked 'Exhibit A.'" Immediately following that recital appears a document purporting to be a lease from the plaintiff to Loomis & Stevens, which is marked "Exhibit ³⁹⁴ A." The written demand for possession appears in the bill of exceptions in very much the same way, that document being marked "Exhibit B." It is true there is no express recital that the documents appearing with those marks are the ones offered in evidence by the plaintiff, but at the close of the bill of exceptions is a certificate that the evidence therein set forth is all the evidence offered at the trial by either party, and as no other exhibits are to be found marked "Exhibits A" and "B," the conclusion necessarily follows that the exhibits so marked are the identical documents offered in evidence by the plaintiff and identified by those marks.

The lease in question, which bears date April 28, 1893, was executed by the parties thereto under their respective hands and seals, and by it the plaintiff demised to Loomis & Stevens certain premises for the term of five years, commencing May 1, 1893. Among the covenants contained in the lease is one which provides that the lessees will not assign the lease, nor let or underlet the whole or any part of the premises, "nor make any alteration therein, without the written consent of said party of the first part, under the penalty of forfeiture and damages." It is claimed by the plaintiff that the lessees, in violation of this covenant, made certain alterations in the premises, by cutting through the floor and the joists supporting the same and putting in stairs descending to the basement of the building, without his written consent, and that the plaintiff thereupon elected to forfeit the lease, and, after serving upon the lessees a written notice of such forfeiture and a demand for possession, brought this suit.

Evidence was given at the trial tending to show that the lessees made alterations in the premises as above stated, and that such alterations were made by and with the oral direction and consent of plaintiff, and the court thereupon gave to the jury the following instruction:

³⁹⁵ "If you believe from the evidence that the plaintiff, Moses, verbally authorized the defendants, Stevens & Loomis, to make the change, if any, which you may believe from the evidence was made in the building, this was a waiver by Moses of the provision of the lease that no alteration should

be made without the written consent of Moses, as that provision was inserted in the lease for the benefit of Moses, and he had a right to waive it."

The assignment of error upon which principal reliance is placed by the appellant is the one which calls in question the propriety of this instruction, and the argument by which the instruction is attacked is based wholly upon the old maxim of the common law that an instrument under seal cannot be varied or abrogated by words not under seal. The contention is, that, as the lease is under seal, the consent of the lessor to alterations in the premises, to be binding on him, could be given only in the mode prescribed in the lease, viz., in writing, and that his oral consent to such alterations, or even his express directions to the lessees to make them, are of no avail. It cannot be denied that the maxim thus sought to be invoked has repeatedly been recognized and applied in this state: *Barnett v. Barnes*, 73 Ill. 216; *Hume v. Taylor*, 63 Ill. 43; *Chapman v. McGrew*, 20 Ill. 101. But the maxim is not applied in this state without various modifications: *White v. Walker*, 31 Ill. 422. Thus it is held that the release of a debt secured by a mortgage need not be under seal: *Ryan v. Dunlap*, 17 Ill. 40; 63 Am. Dec. 334. And usually, where parties are bound to one another by writing under seal, the obligors will be discharged by parol proof of facts, if sufficient in themselves to constitute a discharge.

So rights arising under sealed instruments may be waived by parol. Thus, where a lease contains a condition of forfeiture in case the tenant underlets the premises without the written consent of the lessor, if, after such condition is broken, the lessor does any act which is ^{see} clearly inconsistent with his reliance upon it, such as the acceptance of rent with full knowledge of all the facts, such conduct amounts to a waiver of the condition, so as to preclude the lessor from afterward availing himself of the forfeiture: *Goodright v. Davids*, 2 Cowp. 803; Wood on Landlord and Tenant, 530, and notes.

Manifestly, the same rule should apply to the covenant now under consideration. And here, as the evidence tends to show, the lessees applied to their lessor to put in some stairs so as to give access to the basement of the demised premises, and their lessor replied that he would not be to the expense of putting them in, but that the lessees might do it, and for that purpose might use the old stairs which were then in the basement, and that they thereupon made the necessary open-

ing in the floor and put in the stairs designated by the lessor. These facts show a clear intention on the part of the plaintiff to waive his right of forfeiture growing out of the alteration in the premises thus authorized by him, and we see no reason why he should not be held to such waiver. There is no question, so far as we can see, of any variation or abrogation of the sealed instrument, but merely a waiver by the plaintiff of his right to declare a forfeiture thereunder. In fact, the case would seem to be an appropriate one for an application of the doctrine of estoppel. The plaintiff having, by his words and conduct, caused the lessees to believe that he would not enforce the forfeiture provided for in the lease, and they, with that belief, having made the alterations in question, he ought equitably to be estopped from seeking now to avail himself of the forfeiture.

We are of the opinion that there was no error in the instruction, and, there being no other errors pointed out which seem to us to be worthy of consideration, the judgment of the appellate court will be affirmed.

WAIVER OF FORFEITURE OF LEASE.—Courts of law strive to avoid enforcing forfeitures, and courts of equity relieve against them. As a consequence of this rule it results that if a landlord means to take advantage of any breach of covenant in a lease so that it shall operate as a forfeiture thereof, he must not do anything which may be deemed an acknowledgment of the tenancy and a waiver of the forfeiture. To show a waiver and the determination of the landlord to disclaim the reversion and continue the lease, slight acts are sufficient, and any recognition of a tenancy as subsisting after the right of entry has accrued and the landlord has notice of the forfeiture has the effect of a waiver: *Garnhart v. Finney*, 40 Mo. 449; 93 Am. Dec. 303; *Allen v. Dent*, 4 Lea, 676; *Williams v. Vanderbilt*, 145 Ill. 238; 36 Am. St. Rep. 486. A lessor waives the right to insist upon the forfeiture of his lease by actions which amount to a consent to a departure from the strict letter thereof: *Hukill v. Myers*, 36 W. Va. 639. A waiver of forfeiture may be implied from silence. Thus, if a landlord is entitled by the terms of his lease to exact a forfeiture in case of default in the payment of rent, and when the rent becomes due the landlord demands payment and the tenant says he will credit the amount on a note held by him against the landlord, to which the landlord makes no reply, the latter cannot thereafter insist upon a forfeiture for that particular act as a breach of covenant. If he did not intend to agree to the tenant's proposition it was his duty to say so at the time, and his failure constituted a waiver of the right to declare a forfeiture: *Johnson v. Douglass*, 73 Mo. 168. If a landlord, by acquiescence in his tenant's dilatoriness in the payment of rent, induces the tenant to believe that strict observance of his covenant to pay rent at a specified time is not to be required of him, the lessor thereby waives his right to insist upon a forfeiture for breach of the condition, and equity will not enforce it, especially when full compensation can be made to the landlord: *Thropp v. Field*, 26 N. J. Eq. 82.

Acceptance of Rent.—The most familiar instance of the waiver of the forfeiture of a lease arises from the acceptance of rent by the landlord after condition broken, and it is a universal rule that if the landlord accepts rent from his tenant after full notice or knowledge of a breach of a covenant or condition in his lease for which a forfeiture might have been demanded, this constitutes a waiver of forfeiture which cannot afterward be asserted for that particular breach or any other breach which occurred prior to the acceptance of the rent. In other words, the acceptance by a landlord of the rents, with full knowledge of a breach in the conditions of the lease, and of all of the circumstances, is an affirmation by him that the contract of lease is still in force, and he is thereby estopped from setting up a breach in any of the conditions of the lease, and demanding a forfeiture thereof: *Garnhart v. Finney*, 40 Mo. 449; 93 Am. Dec. 303; *Gomber v. Hackett*, 6 Wis. 323; 70 Am. Dec. 467; *Hukill v. Myera*, 36 W. Va. 639; *Little Rock Granite Co. v. Shall*, 59 Ark. 405; *McGlynn v. Moore*, 25 Cal. 384; *Dahm v. Barlow*, 93 Ala. 120. The landlord may elect to waive a forfeiture by suing for the rent: *Clark v. Jones*, 1 Denio, 516; 43 Am. Dec. 706. If a lessee, by failing to pay the taxes according to a covenant in the lease, thereby gives the lessor a right to re-enter for nonpayment, and, after default in the payment of such taxes, the lessor, with knowledge thereof, accepts rent subsequently accruing, this constitutes a waiver of the right to declare a forfeiture and an affirmation of the continuance of the lease, and the lessee's continued failure to pay the taxes does not give the lessor a right to re-enter. Such right can only arise in case of a new and positive breach, accruing subsequent to such affirmance: *Conger v. Duryee*, 90 N. Y. 594. A receipt by a landlord for rent in advance, with full knowledge that covenants in the lease have been previously broken, is a waiver of the forfeiture and an affirmation of an election to continue the lease for the time for which the lessor receives the rent: *Brooks v. Rogers*, 99 Ala. 433. A forfeiture of a lease cannot be enforced under a stipulation therein that it shall be void for default of any payment for thirty days, merely because of failure for that time to pay any part of a certain payment due, if both parties have disregarded the strict terms as to payments, some payments being made before due, and no reference is made to the default until long after the amount due has been paid: *Westmoreland etc. Gas Co. v. De Witt*, 130 Pa. St. 235. Acceptance of rent by a lessor, after the lessee has committed a breach of his covenants, such as authorizes the landlord to declare a forfeiture, is not a waiver thereof, if the lessor is ignorant of such breach at the time of the acceptance of the rent: *Walker v. Engler*, 30 Mo. 130; *McGlynn v. Moore*, 25 Cal. 385. If a lease provides for a re-entry and termination thereof for nonpayment of rent, the acceptance of rent in arrears, after notice of forfeiture and a termination of the lease, does not constitute a forfeiture, unless the rent accepted became due after the breach was committed by the tenant: *Silva v. Campbell*, 84 Cal. 420. Hence, a lessor does not waive his right to claim a forfeiture for nonpayment of rent, by collecting rents subsequent to notice to vacate and applying such collections to the payment of installments of rent falling due prior to the one upon which a forfeiture is claimed: *Carruher v. Bell*, 7 Wash. 81. A landlord, under a lease providing that, on default by the tenant in the payment of rent and taxes at all times and in a manner specified, the former shall have the option to declare the lease terminated and forfeited, or to pay the taxes and make them a lien on the leasehold estate, and improvements thereon, paramount to all other liens, does not waive his right to elect to declare a forfeiture for the

nonpayment of rent by forbearing to collect it promptly as it falls due, and allowing the tenant to be habitually in default, or by paying the taxes which should have been paid by the tenant: *Douglas v. Herms*, 53 Minn. 204. Conditions of a continuing nature in a lease are waived by the acceptance of rent by the landlord only as to past breaches. The landlord is not thereby precluded from taking advantage of a forfeiture resulting from a subsequent or continued breach: *Gluck v. Elkan*, 36 Minn. 80; *Alexander v. Hodges*, 41 Mich. 691; *McGlynn v. Moore*, 25 Cal. 385. A lease is forfeited and terminated if, after the tenant is in default, the lessor refuses to accept payment of the arrears of rent, and leases the same property to another person, and a waiver of forfeiture for such nonpayment of rent cannot be thereafter claimed against the landlord by the original tenant: *Guffy v. Hukill*, 34 W. Va. 49; 26 Am. St. Rep. 901. A right of re-entry and forfeiture, upon failure to pay rent, must be enforced during the term, otherwise the forfeiture is waived. Thus if, under a lease, the buildings erected on the premises are subject to forfeiture for a failure to pay rent, and a new lease makes such conditions of the old lease binding as are not changed by the express terms of the new lease, and one of these terms mortgages the buildings to secure the rent, the right of forfeiture is waived, and does not exist under the new lease: *Cheatham v. Plinke*, 1 Tenn. Ch. 575. The subject of the enforcement of the forfeiture of a lease for breach of conditions by the lessee is treated at length in a note to *Guffy v. Hukill*, 26 Am. St. Rep. 911-913.

Subletting—Assignment.—If a lease is subject to forfeiture by the act of the lessee in subletting the premises, the right of forfeiture is waived if the lessor, with knowledge of the forfeiture, accepts rents after the breach of the condition, or sues out distress for rent accruing after the forfeiture: *McKildoe v. Darracott*, 13 Gratt. 278; *Ireland v. Nichols*, 46 N. Y. 413. A notice by a landlord, as provided by statute, to pay rent, or he will re-enter, given with knowledge that the tenant has sublet in contravention of the stipulations in the lease, is a waiver of the forfeiture incurred by subletting: *Frasier v. Caruthers*, 44 Ill. App. 61. Forfeiture of a lease, for breach of a condition against subletting without the landlord's consent, is waived by the latter's acceptance of rent with knowledge of the subtenant's occupancy, and the taking of his individual checks, stating upon their face that they are for rent: *Trauerman v. Lippincott*, 39 Mo. App. 478. Although an assignment of the term by the lessee without the consent of the landlord works a forfeiture of the lease, still such forfeiture is waived by the landlord, with knowledge of the facts, accepting rent from the assignee, although when receiving it the landlord protests against such effect being given to his act in accepting: *Gulf etc. Ry. Co. v. Settegast*, 79 Tex. 256; *Crouch v. Wabash etc. Ry. Co.*, 22 Mo. App. 315. Forfeiture of a lease for breach of a condition against assignment, or subletting, without the written consent of the landlord, is waived by his acceptance of rent for eight years, with knowledge of a partial assignment or subletting of the premises without his written consent, and, in such case, he is estopped from claiming a forfeiture because of such use of the premises: *Smith v. Rector etc. of St. Philip's Church*, 107 N. Y. 611. Forfeiture of a lease by a breach of a condition not to assign is not waived by acceptance of rent from the assignee, unless the landlord has knowledge of the assignment, and this knowledge must be shown: *Kew v. Trainor*, 50 Ill. App. 629; affirmed 150 Ill. 150.

DISTILLING AND CATTLE FEEDING CO. v. PEOPLE.

[156 ILLINOIS, 448.]

CORPORATIONS.—REGULARITY AND LEGALITY OF THE ORGANIZATION of a corporation is impliedly admitted by proceeding against it in its corporate name.

CORPORATIONS.—AN INFORMATION IN QUO WARRANTO against a corporation, setting out its charter, and the proceedings which resulted in its incorporation, in express terms, admits the purposes of its organization and the scope of its corporate powers.

QUO WARRANTO—FORM OF PLEADINGS.—An information in the nature of quo warranto is a civil remedy. The pleadings must conform, as far as possible, to the general principles governing ordinary civil actions.

IN QUO WARRANTO DEFENDANT MUST EITHER DISCLAIM OR JUSTIFY. If he justifies he must set out his title specially.

QUO WARRANTO.—JOINDER OF PLEAS OF JUSTIFICATION AND DISCLAIMER is repugnant and inconsistent, and subject to demurrer in a quo warranto proceeding.

QUO WARRANTO.—DEMURRER TO PLEAS MAY REACH DEFECTS in the information in quo warranto proceedings.

QUO WARRANTO.—SUFFICIENCY OF THE INFORMATION in quo warranto in point of substance to sustain the judgment may be reached either by demurrer, motion in arrest of judgment, or by error, and may be considered on appeal, though not challenged by demurrer.

MONOPOLIES.—COMBINATION OR TRUST organized to control the manufacture and sale of all distillery products, and to thus dictate the amount to be manufactured and the selling price, is illegal and void.

MONOPOLIES.—INCORPORATION of an organization or combination to monopolize a business, and the transfer to it of the property of its members, do not purge it of its illegality.

MONOPOLIES — CORPORATION CHARTER CANNOT AUTHORIZE. — A charter authorizing a corporation to engage in a general distillery business, and to own the property necessary for that purpose, does not authorize it to form a trust and combination, and create a monopoly of such business.

CORPORATIONS—MONOPOLIES—OUSTER.—If a corporation misuses, abuses, and usurps the powers granted by its charter in creating a monopoly, or otherwise, it may be ousted from its franchises by judgment in quo warranto proceedings.

QUO WARRANTO against the Distilling and Cattle Feeding Company. The information alleged that on May 10, 1887, there were existing and doing business in Illinois five different distillery corporations, also one such corporation organized under the laws of Missouri, and one corporation organized under the laws of Ohio, and a copartnership and an individual also doing business in the latter state, all of which were then engaged in operating distilleries, in the purchase of grain and in the manufacture and sale of alcohol and other distillery products, and that for the purpose of forming and creating a trust, and with the design of control-

ling and regulating the output, manufacture, and sale of distillery products, and of establishing a monopoly in the manufacture and sale thereof, the owners of the capital stock of such corporations, firm, and individuals entered into a certain trust agreement, by which was formed the Distillers and Cattle Feeders' Trust. The information further alleged that within one year thereafter there had been absorbed by such trust, under the terms and provisions of its trust agreement, eighty-one different distillery companies organized under the laws of the various states in which they were respectively located and doing a distillery business; that twenty-two of the distillery companies thus absorbed by the trust, and which had transferred all their capital stock thereto, were corporations organized under the laws of Illinois; that in February, 1890, for the purpose of more perfectly establishing a combination, making its monopoly more complete, and of more fully exercising the power of regulating and controlling the distillery business, and more effectively preventing competition therein, and in order to clothe an unlawful combination in legal garb, the trustees of the Distillers and Cattle Feeders' Trust organized such trust as a corporation under the general incorporation act and name of the Distillers and Cattle Feeders Company; that the trustees of the said trust at the time of the organization of the said corporation subscribed for all the stock therein, and elected themselves its directors; that at the same time they, or so many of them as were necessary to constitute a majority of the directors of each of the corporations composing the trust, were directors thereof, and holders of all the stock in such corporations, and that they directed a conveyance of all the property which those corporations held to the newly formed corporation, and that as directors of those corporations they executed to the Distilling and Cattle Feeding Company a transfer of all the property of those corporations, except such as was held by them, and this they continue to hold; that upon the incorporation of the Distilling and Cattle Feeding Company, the holders of stock in the said trust were called together, and their certificates of stock therein surrendered to the trustees thereof, and that there was issued to them, in lieu thereof, shares of stock in the newly formed corporation which assumed and agreed to discharge all the contracts and obligations of said trust to the former owners of stock in the corporations forming such trust; that such corporations con-

tinue as corporations in form, but have not been operated since the organization of the Distilling and Cattle Feeding Company; that the franchises of such corporations, since they have been absorbed by such trust, have been paralyzed and useless in the hands of the newly formed corporation; that that company directs, controls, and manages the property of those corporations as fully and completely, and with the same intention and design, and for the accomplishment of the same purposes as the property and business of those corporations were managed and operated under the said trust agreement, and that the newly formed corporation is, in fact, a continuation of said trust; that the Distilling and Cattle Feeding Company has continued to procure and obtain, from time to time, by purchase or otherwise, the entire distillery property and business of a large number of other distilleries organized under the laws of the various states, and that at the time of making such purchases, and as a part consideration therefor, it exacted from the holders of a majority of the stock of such institutions contracts that they would not, at any time within five years from the date of the purchases, engage in the business of distilling at any place in the United States within one thousand miles of Chicago. The information further alleged that the Distilling and Cattle Feeding Company has been so managed and operated that it controls and has a monopoly of the distillery business of the United States north of the line of the Ohio river; that it has been the policy of this corporation, carried out by its officers, to prevent competition, to regulate and control the production and output of all distillery products, and to dismantle and keep idle a large number of distilleries now within its control by purchase or otherwise; that it has introduced a system of disposing of its output, by which, through various distributors in different parts of the United States, its productions are sold, and with each sale there is given to the purchaser a voucher of rebate, promising to repay seven cents per gallon on the amount purchased at the end of six months, provided the purchaser shall have bought all his supply of distillery products from said corporation; that by means of such rebate system said corporation brings within its control every dealer who becomes its patron, and thus dictates prices to all consumers at pleasure. The information then alleges that the defendant corporation, by means of the combinations before mentioned, has created a monopoly in the

manufacture and output of distillery products, and has secured such control over the consumers thereof as to destroy all competition in the manufacture and sale of such products throughout the United States, and has and continues to misuse, abuse, and pervert the powers and privileges conferred on it by law, and prays that it be summoned to answer by what right it has so misused and perverted its powers and franchises, and assumes to exercise the aforesaid powers, liberties, privileges, and franchises. The defendant corporation filed five pleas to the information. A demurrer was sustained to all the pleas. Judgment of ouster was entered against the defendant, and it appealed.

The first plea of the defendant, and the only one necessary to set out, admitted that on May 10, 1887, there were existing and doing business in this state, in Ohio, and in Missouri, the seven corporations, the copartnership and the individual alleged in the information, and that on that day they entered into the trust agreement above set forth; that within one year from May 10, 1887, the trust agreement embraced about eighty-one different distillery companies, persons, and firms that had, at some time prior thereto, been engaged in the distillery business; that among them were the several Illinois corporations named in the information; that those corporations had all become parties to the trust agreement prior to February 11, 1890, and that each of them conveyed its real estate to some person to be held in trust for the persons who were then stockholders in the respective corporations, and that the trustee executed back to the corporation a lease of such real estate for the term of twenty-five years, and that the respective stockholders sold and surrendered their capital stock, except so much as was necessary to be retained to qualify for a minority of directors, to the trustees named in the trust agreement and their successors; that the said trustees owned and controlled the stock in these various corporations; that a special meeting of the holders of trust certificates of the Distillers and Cattle Feeders' Trust was held in February, 1890, at Peoria, to consider the advisability of adopting a recommendation of the trustees to form a corporation with a capital stock of thirty-five million dollars, and that at such meeting the preamble and resolutions set out in the information were unanimously adopted; that the defendant was organized as stated in the information, and that its charter is therein correctly set forth; that the first board of

directors of the Distilling and Cattle Feeding Company, incorporated as alleged, were the same individuals who had been trustees, and that they so continued until the annual election of directors; that the defendant subsequently purchased the property and business of H. H. Shufeldt & Co., and the property of the Calumet Distilling Company, as alleged; that the defendant had dismantled the plants of the Chicago Distillery Company and of some fifteen other companies, and that it had adopted the form of rebate voucher in the information set forth.

The plea then denies that all the firms and individuals mentioned as signing the trust agreement were, on May 10, 1887, engaged in operating distilleries, in the purchase of corn, and in the manufacture of spirits and in the sale of the same. It denies that the trust agreement was signed by said persons and corporations for the purpose of forming and creating a trust, with the design of controlling and regulating the output, manufacture, and sale of distillery products in the county of Cook and state of Illinois, and in the United States of America. It denies that the agreement was entered into for the purpose of establishing a monopoly in the manufacture and sale of alcohol, spirits, and high wines and all other distillery products. It denies that the eighty-one distilling companies mentioned in the information were, at the time they became parties to the agreement, or had been for several years prior thereto, carrying on and operating the distilling business, and producing alcohol, spirits, and high wines, and all other distillery products from the distillation of grain, or that they were then engaged in the sale of such products. It denies that all of said distilling companies transferred their capital stock to the Distillers and Cattle Feeders' Trust. It denies that the real estate of the respective corporations named in the information was conveyed to any trustee for the purpose of carrying out any scheme of combination and trust, or that the stock of such corporations was sold and transferred to the trustees of the trust for the purpose of effecting or carrying out any unlawful organization. It denies that the properties formerly belonging to the several corporations were transferred to the defendant under and by virtue of, or in accordance with, the preamble and resolutions set out in the information as having been adopted by the certificate holders in February, 1890. It denies that in pursuance of such resolutions, and for the purpose of more perfectly estab-

lishing said combination and making the monopoly thereof more complete, and exercising more fully the power of regulating the production of alcohol, spirits, and high wines, and of more effectually preventing competition in the distillery business, and in order to clothe the unlawful combination in legal guise, the trustees organized the defendant corporation, and it denies that the defendant was formed with any such purpose or intent as charged in the information.

The plea further denies that the trustees of the trust executed, or caused to be executed, to the defendant company transfers or conveyances of all the property of every kind and description. It denies that the individuals who were trustees of the trust and who were directors of the defendant, or who were directors of the respective corporations above mentioned, continued to hold, or still hold, any stock in those corporations, and it denies that the individuals who were at the time to transfer, and did transfer, all the property of the respective corporations to the defendant, then were and still remain directors of those corporations, and then were and still are directors of the defendant. It denies that the holders of certificates in the trust were called together, and that their certificates were surrendered to the trustees of the trust, and that there were issued to them, in lieu thereof, shares of the capital stock of the defendant, as alleged in the information. It denies that the several corporations which went into and became members of the trust still continue as corporations in form. It denies that the defendant controls and manages the property of those corporations as stated in the information. It denies that the defendant manages said property, or any of it, as it was managed by the respective corporations while parties to the trust. It denies that the defendant is a direct continuation of the trust. It denies that the defendant has been so managed and operated by its directors as to have come into the control and substantial monopoly of the business of manufacturing high wines, spirits, and other distillery products from grain in the United States. It denies that it has succeeded in obtaining, by means of the methods set out in the information, the ownership or control of every distillery property that in November, 1892, was in active operation in that portion of the United States north of the Ohio river. It denies that in November, 1892, and at the present time, it was and is in control of the business of distilling high wines, spirits, and

alcohol, so as to produce or control, or to now produce or control, ninety-five per cent of the entire product of those articles in the United States. It denies that it has been or is now its policy, for the purpose of preventing competition and controlling the production and output of high wines, spirits, and alcohol, to dismantle and keep idle, or that it has dismantled and kept idle, a large number of distilling plants which it has purchased or into the possession of which it has come. It denies that it is a part of the defendant's policy to dismantle any plants or prevent their being used, or that it has or does keep such property idle that could be used without loss in the production of alcohol, spirits, and high wines. It denies that by means of the operation of the rebate system the defendant brings under its control every dealer who becomes its patron, or that he is thereafter forced to continue his exclusive patronage or subject himself to a greater or less loss of money which he would otherwise obtain.

The plea further denies that the defendant has obtained the absolute control of the output and manufacture of high wines, spirits, and alcohol. It denies that the defendant has been so operated as to subject all its patrons to such condition that it has grasped, and continues to grasp, nearly the entire distillery product and trade. It denies that the defendant has been or is now enabled to dictate, or that it does dictate, prices to consumers at pleasure. It denies that the defendant has exercised, or now exercises, such power of control over the output of distillery products, and over consumers of the same, as to destroy all competition in the manufacture, furnishing, and sale of distillery products. It denies that for twelve months last past, at the county of Cook, the defendant has misused and perverted the powers and privileges conferred on it by law. It denies that it still continues to misuse and pervert its powers and privileges, or that it has usurped and willfully exercised, or still continues to usurp and willfully exercise, powers, liberties, privileges, and franchises not conferred by law. It denies that the defendant has, in any manner and form, as stated in the information, abused its powers and privileges, contrary to the statutes of the state or the common law of the land. It denies that it has destroyed all diversity of interest and of competition among the distilleries, properties, and plants which are held and owned, or which were held and owned, by their former

owners. It denies that the defendant has unlawfully misused and perverted its powers and franchises, and usurped to itself, and still unlawfully usurps, holds, and exercises, the power of maintaining a monopoly on the production, for sale, of high wines, alcohol, spirits, and other distillery products. It denies that the defendant has, in any sense, as charged in the information, attempted to monopolize, or had any purpose of monopolizing, the manufacture and sale of distillery products. It denies that the powers and franchises granted to the defendant in and by its charter have been for twelve months last past, and still are, perverted and abused by the defendant, its stockholders, directors, and managers, for the purpose of establishing a monopoly in the distilling business. It denies that the defendant has, by the means stated in the information, or in any other way, created and established, and now maintains in the county of Cook, a virtual monopoly on the business of producing for sale, and of selling, high wines, alcohol, spirits, and other distillery products, contrary to law and against the peace and dignity of the people of the state of Illinois.

The plea then alleges, on the contrary, that the defendant uses its franchises, powers, and privileges in the state of Illinois under and by virtue of the charter set out in the information, which charter is made a part of the plea, and under and by virtue of no other power or authority than that conferred by said charter and the laws of the land; that after its incorporation the defendant purchased the various plants of the companies, persons, and firms named in the information for a good and valuable consideration, for the purpose and with the intention of utilizing and using such plants in producing distilled spirits, high wines, and alcohol, and for no other purpose whatever; that it found, on investigation, that some of the plants so purchased, on account of their location and construction, could not be operated without loss, and thereupon the defendant did dismantle some of them, and used the machinery therein in refitting and repairing the other plants purchased of the corporations and persons in the information mentioned; that said plants were not dismantled for the purpose of preventing competition, but for the purpose of using their machinery in repairing and refitting other plants better located for the business, and in which distilling could be carried on more economically and successfully; that prior to and at the time the defendant purchased the properties

described in the information the producing capacity in the territory in the information mentioned was at least four times greater than the demand in this country for distilled spirits, alcohol, high wines, and other products of the still, by reason whereof a large number of the plants, to wit, forty-eight, had been for a long time idle, and portions of their machinery had become useless, and they were valuable only for such machinery as had not been injured by nonuse and was capable of being used in refitting other distilleries, as above stated; that the defendant's sole and only purpose in purchasing said properties was to operate distilleries to meet the demand of the public and to secure only fair remuneration and returns for the investment, and not to create a monopoly, or prevent, in any manner, any other persons, parties, or corporations from engaging in like business in the territory described in the information.

The plea further alleges, that in the purchase of all of these properties, except that known as the H. H. Shufeldt & Co. property and the Calumet distillery property, the defendant placed no restrictions upon the sellers from going into the same business at any time and anywhere in the United States; that it purchased the Shufeldt property from the firm composed of Henry H. Shufeldt and John Lynch, and that in the purchase of that property and the good-will of the business the sellers contracted not to engage in the business within one thousand miles of Chicago for the limited period of five years, and a similar contract existed with the Calumet Distilling Company, and that these were the only two properties touching which any condition or restraint was imposed upon the sellers in the purchase of said several properties; that all of the properties purchased from corporations were purchased under and by direction and authority of the stockholders and directors of the several corporations; that prior to the sale of the property, to wit, in the months of February and March, 1890, the stockholders in each of the companies adopted substantially the following resolution:

“ WHEREAS, it is deemed best and for the best interests of the stockholders of this corporation to transfer all its property, of every nature, kind, and description, including all brands and good-will of the business, to the Distilling and Cattle Feeding Company, a corporation organized under and by virtue of the laws of the state of Illinois; now, therefore, be it.

"Resolved, by the stockholders of this company, that the board of directors be and they are hereby authorized to provide for the conveyance and transfer, in a proper and legal manner, of all the property of this company to the said Distilling and Cattle Feeding Company; and we, the stockholders, hereby fully authorize and empower said board of directors, in any manner they may deem advisable, to make said sale, conveyance, and transfer, and we hereby ratify and confirm all their acts in that behalf, and we also hereby authorize and empower the president of the board of directors to transfer any and all leasehold interests held by this corporation in any and all real estate and contracts and agreements to the said Distilling and Cattle Feeding Company, under the seal of this corporation.

"Resolved, That so soon as the sale, conveyance, and transfer of said property, and of said leases and leasehold interests, are made in accordance with the provisions hereof, and contracts and agreements are provided for, the board of directors shall provide for the cancellation of all outstanding stock of this corporation, and as soon as the same is canceled to surrender the charter held by this company, and so notify the secretary of state."

That the directors of each of the corporations thereafter, in pursuance of the foregoing preamble and resolutions, did, in the months of February and March, 1890, adopt substantially the following preamble and resolutions:

"WHEREAS, the stockholders of this corporation did, on the — day of February, A. D. 1890, at the office of the corporation, at which all the stock of the corporation was represented, by resolution unanimously adopted, empower the directors to provide for the sale, conveyance, and transfer of all the property of this corporation, of every nature, kind, and description, including assignment of leases and leasehold interests, to the Distilling and Cattle Feeding Company: Now, therefore, be it

"Resolved, by the board of directors, that the president be and he is hereby authorized and empowered to make a proper bill of sale, in the name of the corporation, of all the property, of every nature, kind, and description, and good-will of the business, to the Distilling and Cattle Feeding Company, and also to assign, transfer, and set over any and all leases held by this corporation to the said Distilling and Cattle

Feeding Company, conditioned that the latter shall carry out and keep the covenants of said leases, and shall pay all rents that may become due thereon.

“Resolved, further, That upon so conveying and transferring said property and assigning said leases, and providing for the assuming of all outstanding contracts and agreements of this company, the president be and he is hereby authorized and empowered to cancel the outstanding stock of this corporation, in compliance with the resolution of the stockholders in that behalf; to wind up the affairs of the corporation, and to certify to the secretary of the state of Illinois that the stock is canceled, that the said corporation has discharged all its legal liabilities, ceased to do business, and claims no further powers or privileges under or by virtue of its charter.”

The plea further alleges, that the defendant acquired its property, under and by virtue of the foregoing resolutions, by proper conveyances made by the officers of the respective corporations named in the information, and not otherwise; that immediately upon the transfer of the properties being made to the defendant, the stock of the several corporations mentioned in the information was duly canceled, and the business of the corporations wound up; that no stock in any of those corporations has been in existence, or outstanding, or held by any person or parties, since May 1, 1890, and the secretary of state of Illinois has been notified, by affidavit, that all of those corporations organized under the laws of this state have paid their debts, canceled their stock, and ceased to do business, and no longer claim any rights under their respective charters, and that the secretary of state is at liberty to use any of their names for any new corporation.

The plea further alleges that the defendant has not, at any time since its incorporation, produced to exceed sixty-five per cent of the alcohol, spirits, and high wines required by the trade or consumers; that it has not, at any time, and does not now, monopolize the trade in spirits, alcohol, and high wines in the territory named or elsewhere in the United States; but, on the contrary, shows that there are, and were at the commencement of this proceeding, in active competition with the defendant in the production of alcohol, spirits, and high wines, some eighteen distillery companies, the names and places of business of which are particularly set forth in the plea, having, in the aggregate, the capacity for the daily consumption of thirty-four thousand seven hundred and fifty

bushels of grain, equal to the production of at least two-thirds of the entire demand for alcohol, spirits, and high wines in the country, and that those companies are in active competition with the defendant in the business, and that the defendant does not monopolize the business of producing spirits, alcohol, and high wines in the territory named in the information or elsewhere; that, in addition to the above, two distillery plants are in process of erection, one at Terre Haute, Indiana, and the other at Peoria, in this state, with an aggregate capacity of eleven thousand bushels of grain per day, both of which are designed for and intended to enter into the production of alcohol, spirits, and high wines, in active competition with the defendant.

The plea further alleges that the defendant has not sought to enhance prices to dealers and consumers, and that the average price to the dealer and consumer since the organization of the defendant has been less than the average price for the ten years preceding its organization; that the adoption of the rebate vouchers mentioned in the information is designed only to secure and retain so much of the trade as it legitimately might and could in competition with other distilleries, designing thereby only to seek a market for its goods without placing any restraint upon the sale of goods produced by other persons, parties, firms, or corporations in competition with the defendant; that the defendant has a fixed price, from time to time, for its goods, based upon the cost of production, and that it has sought only, in fixing such price, to secure fair returns upon the money and labor invested in the business, and that it has not sought, at any time, to dictate or control the prices at which the goods produced by any other person, firm, or corporation should be sold in the market, and that it has not sought to control the market any farther than by fair and open competition in the markets of this country and of the world.

Stevens & Horton and Runnells & Burry, for the appellant.

M. T. Moloney, attorney general, *Samuel Richolson*, *T. J. Scofield*, and *M. L. Newell*, for the appellee.

481 BAILEY, J. This proceeding being brought against the defendant by its corporate name, the regularity and legality of its organization as a corporation are impliedly admitted: *People v. City of Spring Valley*, 129 Ill. 169. And not only is this so, but the information sets out the defendant's char-

ter, and the proceedings which resulted in its incorporation, in express terms, thus expressly admitting the purposes of its organization and the scope of its corporate powers. The question, then, of the defendant's organization, ⁴⁸² and of its right not only to exercise the franchise of being a corporation, but to use and exercise the several powers conferred by its charter, is not raised by the information and is not in controversy here.

But the information charges the defendant with abusing its franchises, and with usurping and exercising powers, privileges, and franchises which do not belong to it; and assuming, for the present, that those charges are sufficient to require an answer from the defendant, the first question presented is, whether the court below properly sustained the demurrer to the defendant's pleas.

The tendency of the courts in modern times being to regard an information in the nature of a quo warranto in the light of a civil remedy, invoked for the determination of civil rights, although still retaining its criminal form and some of the incidents of criminal proceedings, the better doctrine now is that the pleadings should conform, as far as possible, to the general principles and rules which govern in ordinary civil actions: High on Extraordinary Legal Remedies, sec. 710. And this is especially so in this state in view of section 10 of our Practice Act, which provides that in cases of this character it shall be sufficient to summon the defendant to appear and answer the plaintiff in an action of quo warranto, and that the issues shall be made up by answering, pleading, or demurring to the petition, as in other cases: 2 Starr & Curtis' Annotated Statutes, 1780.

It has been repeatedly held in this state that in proceedings of this character the defendant must either disclaim or justify. If he disclaims the people are at once entitled to judgment; and if he justifies, he must set out his title specially: *Clark v. People*, 15 Ill. 213; *Illinois Midland Ry. Co. v. People*, 84 Ill. 426; *Holden v. People*, 90 Ill. 434; *Carrico v. People*, 123 Ill. 198. See, also, High on Extraordinary Legal Remedies, sec. 716.

In our opinion none of the pleas in this case conform to this rule. The first plea, the substance of which is set out at length in the foregoing statement, is partly a plea ⁴⁸³ of justification and partly a disclaimer, but is neither a complete plea of justification nor a full disclaimer, and very

much the same thing may be said of all the other pleas. As was said in *Illinois Midland Ry. Co. v. People*, 84 Ill. 426: "Such pleas must be consistent, and not allege defenses repugnant to each other. This one contains some matters tending to show justification and others tending to show a disclaimer. In that respect the defenses set up are repugnant and inconsistent with each other, and for that reason the plea is bad."

But in addition to this, all the pleas, with perhaps the exception of the fifth, contain various defects of form, which are sufficiently pointed out by the special demurrer. The first plea—and to a lesser extent the second, third, and fourth pleas—shows an evident attempt to follow the usual form of an answer in chancery, rather than that of a plea at law. The first plea commences with an express admission of many of the allegations of the information. Then follow a large number of express denials of particular facts alleged in the information (those denials, so far as they go, being in the nature of disclaimers), and the plea closes with express allegations of a large number of affirmative facts, intended, apparently, to serve by way of justification. But even if the disclaimer and the justification were both full and complete, they constitute repugnant and inconsistent defenses, and the attempt to join them in the same plea renders the plea obnoxious to demurrer.

The second plea is substantially like the first, omitting the denials. The third plea embodies simply the denials contained in the first, and the fourth contains the affirmative allegations appearing in the first.

Various of the allegations of these pleas are evasive and argumentative, and constitute negatives pregnant. It would be tedious to discuss at length the various defects of form in these pleas pointed out by special demurrer, and one or two must serve by way of example. Thus, ~~484~~ the denial that all the firms, individuals, and corporations mentioned as signing the trust agreement were on May 10, 1887, engaged in operating distilleries, in the purchase of corn, and in the manufacture of spirits and the sale of the same, may be true, and yet all the distillery companies, firms, and individuals but one may have been engaged in all those lines of business, and that one may have been engaged in part of them. Of the same character is the denial that all of the distillery companies joining the trust transferred their capital stock to

the trust. This may be true, and yet all but one may have made such transfer of their stock. Various other similarly evasive averments might be cited. The pleas are double, in that they attempt to raise a great variety of issues, some material and some immaterial, thus tending to great and unnecessary prolixity of pleading. That pleas containing such defects were obnoxious to both general and special demurrers seems too clear to require extended argument.

The fifth plea differs somewhat from the others, and should be considered separately. It alleges that the defendant exercises its powers, privileges, and franchises of a corporation under and by virtue of the articles of incorporation set out in the information, and denies that it was organized for the purpose of creating, continuing, perpetuating, or being a monopoly in the manufacture and sale of distilled spirits, alcohol, and high wines, or that it has done, at any time, any of the acts charged in the information with any such purpose or design, and denies all abuse or misuse of its powers, as charged in the information.

When this plea is analyzed it will be found that it wholly fails to tender any material issue, either by way of justification or disclaimer. It seeks to justify under its articles of incorporation, at the same time denying that it was incorporated for the purpose of creating a monopoly, or that it has done any of the acts charged ⁴⁸⁵ with that purpose, thus seeking to raise an issue upon the purposes or motives which actuated those who were instrumental in its organization or who have conducted its affairs, without reference to the legal character and consequences of the acts charged. If the defendant is guilty of usurping and exercising powers and franchises not conferred upon it by law, the purpose or design with which it has done so is of little materiality. The denial that the defendant has abused and misused its powers, as charged, is not coextensive with the charges of the information; as the defendant is there charged not only with abusing and misusing the powers conferred, but also with usurping and exercising powers not conferred upon it. It thus appears that the issues tendered by the fifth plea are either evasive or immaterial, and that the demurrer to that plea also was properly sustained.

Counsel for the defendant, as we understand them, practically admit the informality and insufficiency of their pleas, but insist that the information is materially defective, and

that it is insufficient on its face to warrant or sustain the judgment of ouster, and they claim that the demurrer ought therefore to have been carried back and sustained to the information. It is undoubtedly the rule that in proceedings by quo warranto, as in other suits at law, a demurrer reaches back to the first defect in pleading, so that a demurrer to a plea may reach defects in the information: *People v. Mississippi etc. R. R. Co.*, 13 Ill. 66; *People v. Whitcomb*, 55 Ill. 172. The attorney general, on the other hand, insists that as no motion was made in the court below to carry the demurrer back to the information, it is too late to raise the question here. As the case is presented in this court we do not regard it a matter of any material consequence whether the demurrer is technically carried back to the information, since the defects alleged by the defendant, if they exist, are such as may be taken advantage of on error, whether previously challenged by ~~the~~ demurrer or not. They go to the sufficiency of the information, in point of substance, to sustain the judgment, and are available either on demurrer, on motion in arrest of judgment, or on error. The question, then, is fairly presented whether the information is sufficient to sustain the judgment of ouster.

There can be no doubt, we think, that the Distillers and Cattle Feeders' Trust, which preceded the incorporation of the defendant, was an organization which contravened well-established principles of public policy, and that it was therefore illegal. No one who intelligently considers the scheme of this trust, as detailed in the information, can for a moment doubt that it was designed to be, and was, in fact, a combination in restraint of trade, and that it was organized for the purpose of getting control of the manufacture and sale of all distillery products, so as to stifle competition and to be able to dictate the amount to be manufactured and the prices at which the same should be sold, and thus to create, or tend to create, a virtual monopoly in the manufacture and sale of products of that character. No other business principles can be suggested upon which the development of such an elaborate and far-reaching scheme can be accounted for. No rational purpose for such organization can be shown consistent with an intention to allow business to run in its normal channels, to give competition its legitimate operation, and to allow both production and prices to be controlled by the natural influence of supply and demand, and the results, as

shown by the information, were such as might be anticipated. The trust obtained possession of nearly all the distilleries and of nearly the entire distillery product of the United States, thus enabling it to dictate prices and the amount of production, and to thus draw to itself the substantial control of the distillery business of the country.

Combinations of this character have been frequently made the subject of judicial investigation within the last ⁴⁰⁷ few years, and while the proceeding has most generally been against some one of the corporations entering into the trust, the courts, so far as they have had occasion to speak on the subject at all, have held such trusts to be illegal. Among cases of this character reference may be had to *State v. Nebraska Distilling Co.*, 29 Neb. 700. The defendant in that case was one of the corporations entering into and forming the trust now under consideration, and while it was held that the action of the defendant corporation in entering into the trust was an abuse of its corporate powers, and so *ultra vires*, and the judgment of ouster was sustained on that ground, still the court, in its argument, takes the position, broadly, that the trust, having a tendency to destroy competition and to create a monopoly, was contrary to public policy and unlawful, and the inference fairly arises that if the exigencies of the case had required it, the court would have unhesitatingly placed its judgment on that ground.

Another case of a similar character is *State v. Standard Oil Co.*, 49 Ohio St. 137; 34 Am. St. Rep. 541. The defendant in that case was an Ohio corporation which had become a member of the Standard Oil Trust, a trust organized upon very much the same plan as the one under consideration here. There the defendant was ousted from its power to make or perform the trust agreement, on the ground that such agreement was *ultra vires*. But the court, in its opinion, in speaking of the Standard Oil Trust, says: "Its object was a virtual monopoly of the business of producing petroleum, and of manufacturing, refining, and dealing in it and all its products, throughout the entire country, and by which it might not merely control the production, but the price, at pleasure. All such associations are contrary to the policy of our state, and void."

The case of *People v. North River Sugar Refining Co.*, 54 Hun, 354, 7 N. Y. Supp. 406, was a proceeding brought to vacate the charter of the defendant corporation for its action

in becoming a member of the "Sugar Trust," an association organized ⁴⁸⁸ upon substantially the same plan as the trust in this case. It was held by Barrett, J., at special term, and by Daniels, J., at general term, that the trust was organized for an unlawful purpose, and that the action of the defendant corporation in entering into the association justified its dissolution. The judgment in this case was subsequently affirmed by the court of appeals, the latter court placing its decision solely on the ground of *ultra vires*, without expressing an opinion as to the legality of the trust: *People v. North River Sugar Refining Co.*, 121 N. Y. 582; 18 Am. St. Rep. 843.

In *Richardson v. Buhl*, 77 Mich. 632, a corporation known as "The Diamond Match Company" was organized under articles of incorporation which stated that its business was to manufacture, buy, sell, and deal in friction matches, and all articles entering into the composition and manufacture thereof, and also in machines and machinery, whether applicable to the manufacture of friction matches or to certain other purposes, and to purchase, own, and sell exclusive rights under letters patent relating to the manufacture of friction matches and to machines and machinery applicable thereto, and to other purposes, and to buy, sell, own, and deal in any real or personal property necessary or convenient to the prosecution of the business. It appeared that the real object of the corporation was to buy up the property of all corporations or individuals engaged in the manufacture of friction matches, exacting from the seller, in every case, a bond that he would not, for a term of years, engage in, or aid any one else in, the manufacture of matches in any place where his action might conflict with the interest or diminish the profits of the Diamond Match Company. Suit was brought in Michigan to restrain the defendants from disposing of certain stock in the match company, held by them as security for a loan to the complainant to enable him to purchase the stock, and the circuit court granted the injunction. On appeal the purposes of the ⁴⁸⁹ company were declared to be unlawful, and it was held that any contract made to further them was void, as against public policy, and such as the court would neither enforce while executory nor relieve against when executed. It was held that a corporation organized for the purpose of controlling the manufacture and sale of friction matches, and by means of which all competition was stifled and opposition crushed, and the whole busi-

ness of the country in that line engrossed by the corporation, was a menace to the public, its object and direct tendency being to prevent fair competition and to control prices; that it is no answer to say that the monopoly had, in fact, reduced the prices of friction matches; that such policy may have been necessary to crush competition; that the fact exists that it rests in the discretion of the corporation to raise prices at any time to an exorbitant degree, and that such combinations have frequently been condemned by courts as unlawful and against public policy.

In *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 17 Am. St. Rep. 319, the defendant corporation was organized under the general incorporation law of this state for two purposes, as expressed in its articles of incorporation: 1. For the purpose of erecting and operating gas works for the manufacture and sale of gas in Chicago and other places in this state; and 2. "To purchase and hold or sell the capital stock, or purchase, or lease, or operate the property, plant, goodwill, rights, and franchises of any gas works or gas company or companies, in Chicago or elsewhere," etc. The company sought to exercise the powers claimed under the second clause only, and for that purpose bought a majority of the shares of the stock in all the gas companies in Chicago, being four in number, whereby it might have the control of all the gas companies in the city, and thus destroy competition and monopolize the gas business, and it was held that the corporation so formed was not organized for a lawful purpose, and that ⁴⁹⁰ all acts done by it toward the accomplishment of such object were illegal and void.

Many other decisions of similar import might be referred to, but the foregoing will suffice. They are sufficient, in our opinion, to establish the conclusion, in which the courts of the country, with very great unanimity, seem to concur, that trusts of the character of the one described in the information as existing prior to the organization of the defendant corporation are against the policy of the law, and are therefore illegal and void.

But the defendant contends that, while this may all be so, the change in organization from an unincorporated association to a corporation, and the change in the mode of holding the distillery properties of the various corporations formerly belonging to the trust, by surrendering the stock of the corporations by means of which the control of those properties

was formerly maintained, and having the properties themselves transferred and conveyed directly to the defendant corporation, have purged the combination of its illegality. It must be admitted that these changes, so far as they have any effect upon the rights or interests of the former stockholders in those corporations or of the public, are formal, rather than substantial. The same interests are controlled in substantially the same way and by the same agencies as before. The nine trustees of the trust, who, as the holders of all the capital stock of the corporations and as a majority of the directors of each, controlled such corporate property, became the subscribers for all the stock of the new corporation and its board of directors. The conveyance and transfer of the properties of the constituent companies to the new corporation was merely a transfer by the trustees to themselves, though in a slightly different capacity, and the former stockholders in the constituent companies simply exchanged their trust certificates, share for share, for stock in the new corporation. That corporation thus succeeds to the trust,⁴⁹¹ and its operations are to be carried on in the same way, for the same purposes, and by the same agencies, as before. The trust, then, being repugnant to public policy, and illegal, it is impossible to see why the same is not true of the corporation which succeeds to it and takes its place. The control exercised over the distillery business of the country—over production and prices—and the virtual monopoly formerly held by the trust, are in no degree changed or relaxed, but the methods and purposes of the trust are perpetuated and carried out with the same persistence and vigor as before the organization of the corporation. There is no magic in a corporate organization which can purge the trust scheme of its illegality, and it remains as essentially opposed to the principles of sound public policy as when the trust was in existence. It was illegal before and is illegal still, and for the same reasons.

But it is urged that the defendant, by its charter, is authorized to purchase and own distillery property, and that there is no limit placed upon the amount of property which it may thus acquire. By its certificate of organization it is authorized to engage in a general distillery business in Illinois and elsewhere, and to own the property necessary for that purpose. It should be remembered that grants of powers in corporate charters are to be construed strictly, and that what is not

clearly given is, by implication, denied. The defendant is authorized to own such property as is necessary for carrying on its distillery business, and no more. Its power to acquire and hold property is limited to that purpose, and it has no power, by its charter, to enter upon a scheme of getting into its hands and under its control all, or substantially all, the distillery plants and the distillery business of the country, for the purpose of controlling production and prices, of crushing out competition, and of establishing a virtual monopoly in that business. Such purposes are foreign to the powers granted by the charter. Acquisitions ⁴⁹² of property to such extent and for such purpose do not come within the authority to own the property necessary for the purpose of carrying on a general distillery business. In acquiring distillery properties in the manner and for the purposes shown by the information, the defendant has not only misused and abused the powers granted by its charter, but has usurped and exercised powers not conferred by, but which are wholly foreign to, that instrument. It has thus rendered itself liable to prosecution by the state by quo warranto, and we are of the opinion that, upon the facts shown by the information, the judgment of ouster is clearly warranted. It will accordingly be affirmed.

Judgment affirmed. —

QUO WARRANTO—FORM OF PLEADINGS.—The nature of the writ, the pleadings, and the proceedings in quo warranto are the subject of the extended note to *People v. Rensselaer etc. R. R. Co.*, 30 Am. Dec. 44-51.

QUO WARRANTO—PLEADING.—In quo warranto the defendant must either disclaim or justify: *Attorney General v. Foote*, 11 Wis. 14; 78 Am. Dec. 689, and note; extended note to *People v. Rensselaer etc. R. R. Co.*, 30 Am. Dec. 52.

CORPORATIONS—MONOPOLIES.—An association of individuals, the object of which is to enable its members to control the price of beer in a designated city and county, is unlawful as in restraint of trade: *Nester v. Continental Brewing Co.*, 161 Pa. St. 473; 41 Am. St. Rep. 894, and note. A corporation organized for the purpose of purchasing and holding all the shares of the capital stock of any gas company within the state of Illinois is not organized for a lawful purpose, and all acts done by it toward the accomplishment of such object are illegal and void: *People v. Chicago Gas etc. Co.*, 130 Ill. 268; 17 Am. St. Rep. 319. See, also, the note to *People v. North River etc. Refining Co.*, 18 Am. St. Rep. 873.

CORPORATIONS—FORFEITURE OF FRANCHISE FOR CREATION OF TRUST OR MONOPOLY.—This question is discussed in *People v. North River etc. Refining Co.*, 121 N. Y. 582; 18 Am. St. Rep. 343, and the extended note to *State v. Atchison etc. R. R. Co.*, 8 Am. St. Rep. 191. If a corporation adopts by-

laws declaring that its directors shall have power to make and fix the standard or market price at which milk shall be purchased by stockholders of the corporation, and, acting under these by-laws, the directors from time to time fix the price of milk to be paid by dealers, and the price so fixed largely controlled the market in and about the city in which the corporation had its place of business, these facts support a verdict that the corporation thus managed constitutes a combination inimical to trade, and therefore unlawful, and are sufficient to sustain a decree forfeiting the charter of the corporation: *People v. Milk Exchange*, 145 N. Y. 267; 45 Am. St. Rep. 609, and note.

HILER v. PEOPLE.

[156 ILLINOIS, 511.]

APPEAL—RECORD.—Affidavits filed in support of a motion to quash an indictment, though copied by the clerk into the record, are no part of the record on appeal, unless incorporated into the bill of exceptions.

BIGAMY.—AN INDICTMENT FOR BIGAMY SUFFICIENTLY AVERS that the first wife is yet living by referring to her as “being then living,” and to defendant as “well knowing” that she was then alive, and as “never having been legally divorced” from her.

BIGAMY.—TWO SUCCESSIVE MARRIAGES, one legal and innocent, the other penal but actual, must be proved against defendant to establish bigamy.

MARRIAGE LEGAL AT COMMON LAW consists of a contract and consent *per verba de presenti*, or if made *per verba de futuro cum copula*, the *copula* is presumed to have been allowed on the faith of the marriage promise, and that the parties, at the time of the *copula*, accepted each other as husband and wife.

BIGAMY.—COHABITATION, REPUTE, AND DECLARATIONS of a man and woman do not constitute a marriage on which a conviction for bigamy can be based by reason of an actual subsequent marriage.

MARRIAGE—EVIDENCE.—PRESUMPTION of marriage arising from cohabitation, repute, and declarations is rebutted by a subsequent actual marriage with another person, and the assumption of similar relations.

BIGAMY—PROOF OF MARRIAGE.—If a common-law marriage is relied upon to sustain a conviction of bigamy, a contract *per verba de presenti*, with proof of cohabitation and all the elements necessary to constitute such marriage, must be proved.

BIGAMY—COMPETENCY OF FIRST WIFE AS WITNESS.—On a trial for bigamy the first wife is incompetent as a witness against the defendant to establish the marriage, and error in admitting her testimony is not cured by subsequently excluding it.

R. L. Fleming, for the appellant.

M. T. Moloney, attorney general, *T. J. Scofield*, *M. L. Newell*, and *J. A. Sterling*, state's attorney, for the people.

514 PHILLIPS, J. At the April term, 1894, of the circuit court of McLean county, the grand jury returned into court an indictment against John T. Hiler for bigamy. The in-

dictment was indorsed a true bill, the indorsement being signed by the foreman. The names of five witnesses were indorsed on the back of the indictment. On motion, the first, second, and third counts were quashed, and on May 25th a trial was had on the remaining counts, and a verdict of guilty under the fifth and sixth counts was found by the jury, and the punishment of the defendant fixed at imprisonment in the penitentiary for the term of one year. A motion for new trial, as also in arrest of judgment, was overruled by the court and a judgment on the verdict entered, and the defendant sued out this writ of error.

One of the causes assigned for quashing the indictment was, that no evidence was introduced before the grand jury upon which the indictment could have been based. One of the errors assigned presents for our consideration that question.

The following affidavit was copied into the record by the clerk, and is claimed to have been filed with the motion to quash:

"John T. Hiler, being first duly sworn, on his oath deposes and says, that he is the defendant in the above-entitled cause; that he is informed and believes that said indictment herein was procured from the grand jury herein upon illegal evidence and without certain material and necessary evidence. Affiant says that he is informed and believes that the grand jury which indicted him had before them no competent evidence of a former marriage between this defendant and the alleged Lizzie Hiler, or between this defendant and any other woman known or not known to said grand jurors, nor had they any evidence before them as to whether or not said parties were living at time of marriage to Grace Washburn, or as to whether ⁵¹⁵ or not said former marriages, or either of them, were or were not legally dissolved; that neither the said Lizzie Hiler nor the said Adelia Karr were present and testified before said grand jury; that the only other witnesses are William Kane, Grace Washburn, and Robert Maxton, all of Bloomington, Illinois. Affiant says that these parties named are known to the state's attorney, and were so known at and for a long time prior to the commencing of said grand jury, and that their places of residence are known and were then known to him, and that the facts herein are known to said witnesses Lizzie Hiler and Adelia Karr, and this fact was known to the state's attorney.

JOHN T. HILER."

The motion to quash was incorporated into the bill of exceptions, and thus became a part of the record; but this affidavit was not incorporated into the bill of exceptions, and hence is no part of the record. There was, therefore, nothing before the court showing, or tending to show, the nature or character of the evidence introduced before the grand jury, so far as appears from the record.

It is also claimed that the court erred in overruling the motion to quash the sixth count of the indictment, because it fails to aver, in direct and positive terms, that the first wife was still alive, as was held to be necessary in *Prichard v. People*, 149 Ill. 50. There the averment of the indictment, "the defendant well knowing the said Eliza Ann Ferguson, his former wife, was then alive," was held to be insufficient. Here, however, the indictment is different. After averring that the defendant did unlawfully and feloniously marry Grace Washburn, the indictment proceeds: "The said Lizzie Myers, said former wife, being then alive, and the said John T. Hiler, well knowing that said Lizzie Myers, his former wife, was then alive, and the said John T. Hiler never having been legally ⁵¹⁶ divorced from the said Lizzie Myers." We regard this averment as sufficient.

It is next contended that no prior marriage was established by the evidence. Section 28, chapter 38, of the Criminal Code (Hurd's Stats., 470), provides: "Whoever, having a former husband or wife living, marries another person, or continues to cohabit with such second husband or wife in this state, shall be deemed guilty of bigamy." Section 29 provides: "It shall not be necessary to prove either of the marriages by the register or certificate thereof, or other record evidence, but the same may be proved by such evidence as is admissible to prove a marriage in other cases." As has been seen, the charge in the indictment, in substance, was, that John T. Hiler, on the twentieth day of September, 1893, did marry one Lizzie Myers, and her, the said Lizzie Myers, then and there had for his wife, and the said John T. Hiler afterward, to wit, on the twenty-first day of February, 1894, in the county of McLean and state of Illinois, feloniously and unlawfully did marry one Grace Washburn, and to her, said Grace Washburn, was then and there married, the said Lizzie Myers, his former wife, being then alive, etc.

It appears from the evidence that the defendant was a resident of Grand Haven, Michigan. He composed music,

played on the piano, and was a good singer. He attended county fairs, where he sold music. He seems to have been married at one time to Mrs. Jennie Graham, and obtained a divorce from her April 14, 1893. On Sunday, September 10, 1893, the defendant was at Appleton, Wisconsin, stopping at the Sherman House. After dinner he went into the parlor and met Lizzie Myers and Miss Stillman. He sang and played on the piano, and then suggested a walk. Another young man joined the party, and the four went to the park. The defendant and Lizzie Myers walked together. They remained at the park during the afternoon, and returned to the hotel in the evening for supper. The defendant testified that on Sunday ⁵¹⁷ afternoon he and Miss Myers talked matters over. He talked about marrying her. On cross-examination, in reply to questions asked, he said:

"Q. Did you ask her that afternoon? A. I asked her if she would keep company with me.

"Q. What did she say? A. She said she was going with a gentleman by the name of Bissle.

"Q. Did you say then you would marry her? A. It was pointing in that way.

"Q. Did you say that? A. Yes, sir.

"Q. She said all right? A. Yes, sir.

"Q. That was on Sunday afternoon? A. Yes, sir."

It also appears from the evidence of the defendant that on Sunday afternoon he arranged with Miss Myers to go with him the next day to Hortonville. On cross-examination he further testified: "The next day I went to Stillman's and took her to Hortonville. She introduced me as her husband. As we went to Hortonville we talked over matters. After we arrived at Hortonville we talked about her introducing me as her husband. I didn't object, but said that would be all right. She is as much to blame as I am, and she did introduce me as her husband, and I agreed to it. We occupied the same bed that night. We went back to Appleton and staid there two nights. At Stillman's she introduced me as her husband and I said we were married. We went from there to Oshkosh. I telegraphed for her to come down there and help me on the 18th. She came the 19th. I was there until the 22d. She left on the morning of the 22d. I went to Sheboygan. I was three days at the fair and she helped me. I went to Milwaukee, was there two weeks, and from there we went to Chicago. I introduced

518 her as my wife from place to place, and we occupied the same bed. We went from there to Mrs. Carle's, at Chicago, and I introduced her as my wife, and I introduced her to visitors who came in to see her, and we occupied the same room and the same bed. When I was at Mrs. Carle's I slept with Lizzie always when I was there, every night. We rented furnished rooms and Lizzie kept charge of it and cooked my meals all the time. After we had been there awhile I went on the road, and then I wrote the letters that have been read, and then got replies, and that continued up to February 23d. The last letter I wrote was from Bloomington, on the morning of the 23d of February, three hours before I met Miss Washburn."

• Mrs. Carle testified that they came to her house in Chicago in September, 1893. He introduced her as his wife. They stopped there and did their own cooking. The witness further testified: "He would be away a week or two at a time. He was selling music. I think the last time he was gone over a month. He went to different towns in Illinois. They kept up a correspondence while he was gone. I saw the letters that he wrote to her. I know his handwriting. He always introduced her as his wife, Mrs. Hiler. That occurred whenever they met other people coming in to see me. I never knew of him introducing her in any other way. They slept in the same bed, of course. She told me they were married in Oshkosh, just the same as she has stated here. Of course I thought they were married. Everybody thought so. I never saw any marriage certificate. I asked him what he had done with his marriage certificate, and he said he had sent it to his mother."

A large number of letters written by the defendant to Lizzie Myers after they had assumed the relation of husband and wife before the public were read in evidence, in which the defendant frequently addressed her as "Mrs. Lizzie Hiler," "Mrs. John T. Hiler," or "my dear wife."

519 These were the leading facts proven on the trial tending to prove a common-law marriage between defendant and Lizzie Myers. Evidence was then introduced showing that on February 23, 1894, the defendant met Grace Washburn, a young lady of Bloomington, at a grocery store in that place, and was introduced to her. That evening he called at her house and proposed marriage. She replied that she was not ready. The next afternoon they met again at the grocery

store. He walked down town with her, and again proposed marriage. She told him to wait awhile. But he did not wait. That afternoon, between 5 and 6 o'clock, they were married. Does the evidence establish a common-law marriage between the defendant and Lizzie Myers?

To constitute the offense charged in this indictment, it was incumbent on the prosecution to show against the defendant two successive marriages—one legal and innocent, the other penal. Both must be actual. The first marriage must be valid and binding, and a marriage in fact. Marriage with capacity and consent, proved by direct testimony, as by the evidence of witnesses who saw and heard the marriage celebration performed between the parties, or record evidence, with identification, would be evidence of actual marriage in fact. Under the decisions of this court a marriage legal at common law is recognized as valid and binding in this state. What constitutes such common-law marriages legal and valid has been recognized by repeated adjudications. To constitute a marriage legal at common law, the contract and consent must be *per verba de presenti*, or if made *per verba de futuro cum copula*, the *copula* is presumed to have been allowed on the faith of the marriage promise, and that so the parties, at the time of the *copula*, accepted of each other as man and wife: *Port v. Port*, 70 Ill. 484; *Heblethwaite v. Hepworth*, 98 Ill. 126; *Cartwright v. McGown*, 121 Ill. 388; 2 Am. St. Rep. 105.

520 Under the evidence in this record it is not shown that any marriage ceremony was performed. No actual marriage, in fact, is proven between defendant and Lizzie Myers. The evidence discloses the fact that the defendant and one Lizzie Myers lived together as husband and wife, so spoke of and introduced themselves to others, and in letters the defendant addressed her as his wife. They were by repute husband and wife during this cohabitation. On many questions cohabitation and repute are adequate evidence from which marriage is presumed. For the determination of many cases, declarations, whether verbal or in writing with evidence of cohabitation and repute, are adequate evidence of marriage. The manner in which persons living together as husband and wife are received among their friends and neighbors, their reputation and declarations, most commonly spring from the fact of cohabitation. As expressed by Bishop in his work on *Marriage, Divorce, and Separation*, volume 1, section 939, they

"are shadows attending on cohabitation, and they should be simultaneous therewith." On the trial of any issue involving the question of marriage all these shadows of and resulting from cohabitation may be introduced in evidence. From the fact of cohabitation, with the attendant shadows, for many purposes there follows the presumption of marriage. This presumption increases with the lapse of time the parties are cohabiting as husband and wife. In this record there is no actual marriage in fact proven, and no proof of a contract *per verba de presenti*, nor is there evidence *per verba de futuro cum copula*. In the absence of such evidence there remains only evidence of cohabitation, with its attendant shadows, from which springs a presumption of marriage. The marriage to Grace Washburn as an actual marriage in fact is shown. Cohabitation and its attendant shadows are shown. Two cohabitations are proven by the evidence, from the first of which a marriage of the defendant to Lizzie Myers would be presumed, and from the second ⁵²¹ of which the marriage of the defendant to Grace Washburn would be presumed, and in the absence of proof of a contract *per verba de presenti* each presumption is similar, the first establishing a marriage, and the second disproving the presumption of such first marriage. Where a marriage, legal at common law, is sought to be shown on which to base a conviction for bigamy, all the elements necessary to constitute such common-law marriage must be proven. There must be evidence of a contract *per verba de presenti*, with proof of cohabitation. In prosecutions for bigamy strict proof of the fact of marriage is required: *Harman v. Harman*, 16 Ill. 85. Where proof of marriage, legal at common law, is sought to be shown it must be absolute proof of marriage: *Hayes v. People*, 25 N. Y. 390; 82 Am. Dec. 364.

In the discussion of this evidence we have wholly omitted from consideration the testimony of Lizzie Myers, which was admitted, and, after the defendant closed his case and the evidence in rebuttal was introduced, her evidence was then excluded. The wife was not a competent witness against the defendant: *Miner v. People*, 58 Ill. 59. The effect of her evidence was prejudicial to such an extent that the defendant did not have a fair trial.

It is unnecessary to discuss the questions raised on the instructions, as they are materially erroneous as given for the state, on account of entirely disregarding the distinction

between a presumption arising from facts proven and presumptions arising from other facts shown by the evidence.

The judgment of the circuit court is reversed, and the cause is remanded.

BIGAMY—PROOF OF FORMER MARRIAGE.—Undoubtedly authority exists to sustain the principles announced in the principal case, that the presumption of marriage arising from cohabitation between a man and woman, coupled with the reputation of being married persons, does not obtain when the result of thus proving the marriage would be to render one of the parties on trial criminally liable for bigamy or some kindred crime. The cases which maintain this doctrine generally hold that in civil suits presumptive evidence, as distinguished from direct evidence, of marriage is *prima facie* sufficient to establish that fact, as when a man and woman cohabit together, speak of each other as husband and wife, and of the circumstances of their marriage; but in suits when criminal conversation, adultery, bigamy, incest, or like crime constitutes the essence or foundation of the action, this rule does not apply, and a more rigid rule is required. In such case the marriage relied upon as a basis for the action must be proved by direct evidence, as a fact before a conviction can be sustained. These cases assert that in a prosecution for bigamy, an actual lawful former marriage must be proved as a fact, and that it must be proved by the record or by witnesses who were present at the ceremony: *State v. Roswell*, 6 Conn. 446; *Case v. Case*, 17 Cal. 598; *Green v. State*, 21 Fla. 403; 58 Am. Rep. 670; *People v. Lambert*, 5 Mich. 349; 72 Am. Dec. 49; *People v. Humphrey*, 7 Johns. 314; *Commonwealth v. Littlejohn*, 15 Mass. 163. Some of these cases have gone to the extreme length of holding that even a confession or declaration of the former marriage, made by the defendant, is not sufficient evidence to establish it as a fact: *People v. Humphrey*, 7 Johns. 314; *State v. Roswell*, 6 Conn. 446; *People v. Lambert*, 5 Mich. 349; 72 Am. Dec. 49. It has also been held that a copy of the record of the marriage is not sufficient to establish it as a fact, without proof of the identity of the parties: *Wedgwood's Case*, 8 Me. 75. Nor is it sufficient to prove that a ceremony was performed, followed by cohabitation for a long period, without showing that the person who performed the ceremony was authorized to perform it: *State v. Hodgskins*, 19 Me. 155; 36 Am. Dec. 742. And it has been said that a conviction for bigamy cannot be sustained if proof of the first marriage, which was informal, and not in accordance with the statute, is not supplemented by proof of cohabitation or the conduct of the parties after marriage: *People v. McQuaid*, 85 Mich. 123. The great weight of authority, as well as the better reasoning, is opposed to the rule laid down by the above authorities and by the principal case. A vast majority of the cases hold that in prosecutions for bigamy the former marriage of the defendant may be established by proof of his conduct, cohabitation, and declarations that the woman with whom he was living was his wife. A marriage thus established, if believed by the jury, is sufficient basis for a conviction, without other evidence of an actual solemnized marriage: *Commonwealth v. Jackson*, 11 Bush, 679; 21 Am. Rep. 225; *State v. Hughes*, 35 Kan. 626; 57 Am. Rep. 195; *Dumas v. State*, 14 Tex. Ct. App. 464; 46 Am. Rep. 241; *Parker v. State*, 77 Ala. 47; 54 Am. Rep. 43; *Langtry v. State*, 30 Ala. 536; *Williams v. State*, 54 Ala. 131; 25 Am. Rep. 665; *People v. Beavers*, 99 Cal. 286; *Hallbrook v. State*, 34 Ark. 511; 36 Am. Rep. 17; *State v.*

Hilton, 3 Rich. 434; 45 Am. Dec. 783. To support an indictment for bigamy, it is sufficient evidence of marriage, in fact, that the parties agreed to be husband and wife, and cohabited and recognized each other as such. It is immaterial whether the person who pretended to solemnize the contract was or was not authorized to perform it, or that either party was deceived by his false representations in that respect: *Hayes v. People*, 25 N. Y. 390; 82 Am. Dec. 364. On a trial for bigamy the first marriage may be proved by evidence that the defendant and the woman lived together, and held themselves out to the world as husband and wife for years; that they had children living with them as their children; that she had signed and acknowledged deeds as his wife, and that subsequent to the bigamous marriage she had sued for and obtained a divorce from him: *State v. Gonce*, 79 Mo. 600. In *People v. Beavers*, 99 Cal. 286, 288, the court said: "In the present case there was no solemnization, but there was consent, followed by a mutual assumption of marital rights, duties, and obligations, and under our statutes these elements conjoined result in a marriage as binding in morals and in law as though it was solemnized by a priest or judge. In the one case we have consent followed by solemnization; in the other, consent followed by the mutual assumption of marital rights, duties, and obligations. The crime of bigamy is committed when a person marries who has another husband or wife living at the time. The mere form of the first marriage is entirely immaterial. The vital inquiry is, Is such a person a husband or wife? The solution of that question being in the affirmative, one element of the crime is proven, and the inquiry passes to the second marriage. The policy of the law recognizing and authorizing this form of marriage is not for the court to support or condemn. It is known to all that it is becoming a common practice with the people, entirely too common. But if bigamy, adultery, and kindred crimes cannot be founded upon such marriages, inducements are offered to the lawless which cannot fail to be seized upon, and which would undoubtedly end in most pernicious results. Many cases hold that the admissions of marriage by a defendant, coupled with cohabitation and repute, are sufficient to sustain a finding of actual marriage." In *Dumas v. State*, 14 Tex. Ct. App. 464-472, 46 Am. Rep. 241, the court said: "It appears to us to be well settled, from the authorities, that general reputation, cohabitation, and admissions of the party are all admissible evidence of the fact of the first marriage. General reputation alone is insufficient, but, taken in connection with cohabitation and admission, is competent evidence to establish a prima facie case sufficient to sustain a verdict and judgment of conviction for bigamy. Whenever such evidence establishes in the minds of the jury, beyond a reasonable doubt, the existence of the fact of a valid first marriage, then it is sufficient in that regard to sustain a verdict and judgment for bigamy." Although it was held in *Commonwealth v. Littlejohn*, 15 Mass. 163, that marriage could not be proved by declarations of the parties that they were married, coupled with the fact that they lived together as man and wife, and had children, and that the fact of such marriage could only be proved by the record or by witnesses present at the ceremony, this rule has been changed by statute, and the fact of marriage may now be proved by admissions of the defendant, coupled with the fact of cohabitation and general repute that the parties are husband and wife: *Commonwealth v. Holt*, 121 Mass. 61. The reasons which sustain this latter rule are well stated in *Commonwealth v. Jackson*, 11 Bush, 679-686; 21 Am. Rep. 225. The court in that case said:

"It seems to us that neither the common law of England, as adopted in

this country, or the American common law, as recognized by the courts of the various states, requires us to hold that one charged with the crime of bigamy cannot be convicted upon clear and satisfactory proof of his declarations that the alleged wife is legally such when those declarations are coupled with evidence of cohabitation with her, and her introduction by him into a community where he resides as his wife. We think the safety, the happiness, and the honor of families, the good order of society, the preservation of public morals, and a due regard to public decency and individual virtue, demand that the rules of the law should furnish every facility for the punishment of crime which a proper regard for the security of the innocent will allow. It is difficult to see any reason for discriminating between admissions to prove a marriage and other facts essential to constitute the legal guilt of the accused; there can be no more danger of doing injustice in receiving such evidence in the class of cases under consideration than in any other. Where the declarations of the prisoner and the fact that he has recognized and cohabited with the woman alleged to be his wife are alone relied upon, the jury should still be told that this is only evidence tending to prove an actual marriage, and that it is for them to decide whether the facts proven are sufficient to warrant them in finding that the prisoner was in fact married to the alleged wife, and unless, they so believe, they should acquit, although they may believe he recognized and cohabited with her as his wife. This will place the declarations of one indicted for a crime in which proof of actual marriage is necessary to make out his guilt upon the same legal footing with those charged with other crimes, and will not give comparative immunity to this detestable crime by obstructing the path of the prosecutor with a rule of evidence which it is believed would render conviction impossible in a large majority of such cases where the moral evidence of guilt is conclusive, and where a conviction could be had by simply applying to that class of cases the same rules of evidence applied to other crimes, subjecting the offender to like punishment."

The rule announced in some of the earlier cases that in prosecutions for bigamy an actual marriage of the defendant must be proven, and that neither cohabitation, reputation, nor confessions or declarations are admissible for that purpose, or, if admissible, are not of themselves sufficient to warrant conviction (*Commonwealth v. Littlejohn*, 15 Mass. 163; *Roswell's Case*, 6 Conn. 446; *People v. Humphrey*, 7 Johns. 314), was affirmed and approved in *State v. Johnson*, 12 Minn. 476; 93 Am. Dec. 241; *West v. State*, 1 Wis. 186. The great weight of authority, including many of the early and nearly all of the late cases, is unquestionably opposed to the doctrine that the declarations, admissions, or confessions of the defendant are not admissible to prove the fact of his first marriage. In prosecutions for bigamy the first marriage may be proved by cohabitation and the confessions or declarations of the defendant that he is married, and such evidence, if full and satisfactory, is sufficient to authorize a conviction without the production of the record or the testimony of a witness who was present at the ceremony, or other proof of a marriage in fact: *Langtry v. State*, 30 Ala. 536; *West v. State*, 1 Wis. 186; *State v. Abbey*, 29 Vt. 60; 67 Am. Dec. 754; *Cook v. State*, 11 Ga. 53; 56 Am. Dec. 410; *State v. Libby*, 44 Me. 469; 69 Am. Dec. 115; *Forney v. Hallacher*, 8 Serg. & R. 159; 11 Am. Dec. 590; *Cayford's Case*, 7 Me. 57; *Oneale v. Commonwealth*, 17 Gratt. 582; *Finney v. State*, 3 Head, 544; *Williams v. State*, 54 Ala. 131; 25 Am. Rep. 665; *Squire v. State*, 46 Ind. 459; *State v. Seals*, 16 Ind. 352; *Warner v. Commonwealth*, 2 Va. Cas. 95; *State v. Britton*, 4 McCord, 256; *Wolverton v. State*, 16 Ohio, 173; 47 Am. Dec. 373. In this last case the

court, in speaking of the admissibility of the defendant's confession of his former marriage, in evidence, said: "Indeed, reasoning upon principle, it would be difficult to assign a reason against the competency of evidence of confession in this case, which would not be equally valid against the proof of any confession, or against receiving a plea of guilty to the indictment. It is true that confessions of marriage may be made by persons living in a state of fornication with a view to secure the offenders from public censure, and thus make a case unlike the ordinary cases of confession against one's interest. This, in our opinion, furnishes no reason for rejecting the evidence as incompetent. It shows rather that the confession thus made should not be relied on and held by the jury, when unsupported, sufficient to work a conviction. In such a case, and indeed in all cases where the confession of a party is given in evidence, its force must depend upon the circumstances under which it is made; and of these circumstances the jury, under the advice of the court, are the proper judges. It is rather a question of credibility than competency of the confession, and, like all confessions, to be considered of much or little weight according to the attending circumstances, and these may be such as to render it very conclusive of the fact, or as tending very little to sustain it. Were courts to reject proof of confession when the time, manner, and circumstances under which it was made were such as tended to weaken or destroy its force, they would be submitting, in fact, their own judgment for that of the jury, and would make it their business to weigh and estimate the value of evidence to the exclusion of those who, by the law, are the legitimate tribunal for that purpose."

On a trial of an indictment for bigamy, the first marriage may always be proved by the admissions of the defendant, and it is for the jury to determine whether such confessions are an admission that he was actually married according to the laws of the country where the marriage was solemnized: *Miles v. United States*, 103 U. S. 304; *Parker v. State*, 77 Ala. 47; 54 Am. Rep. 43. If the declarations and admissions of the defendant, and the fact that he has recognized and cohabited with the woman alleged to be his wife, are alone relied upon, the jury must be instructed that this is only evidence tending to prove an actual marriage, and that it is for them to decide whether the facts proven are sufficient to warrant them in finding that the defendant was in fact married to the alleged wife: *Commonwealth v. Jackson*, 11 Bush, 679; 21 Am. Rep. 225. The deliberate admissions of the defendant of a former marriage, coupled with cohabitation and repute, are sufficient to authorize the jury to convict: *Dumas v. State*, 14 Tex. Ct. App. 464; 46 Am. Rep. 241; *State v. Hughes*, 35 Kan. 626; 57 Am. Rep. 195. In this last case the court said: "As a general rule, the confession of a party, voluntarily and deliberately made, is evidence of the highest nature against him. The objections urged against testimony of this character in a prosecution for bigamy are, that the confession may have been lightly made or stated by parties living in a state of fornication for the purpose of avoiding public censure or public prosecution; but these are reasons which go to the credibility rather than the competency of the testimony. The force and effect of the testimony are to be weighed and determined by the jury, and depend upon the manner and circumstances under which the confession was made. If it was carelessly stated, or the circumstances under which it was made indicated a purpose to conceal from the public illicit relations existing between the parties, the jury should not, upon such unsupported confession, convict the defendant; but where it is freely and solemnly made by parties cohabiting together, and frequently repeated to different persons, with no

apparent motive to hide the real facts, it is clearly competent to go to the jury, whose province it is to determine its sufficiency. It is direct and positive proof of an actual marriage. The confession in this case was that the appellant and Mary Wheat were married in Missouri. In that state it is not essential to the validity of a marriage that there should be any ceremony or formal solemnization of the contract. An agreement entered into in good faith between parties capable of contracting marriage, followed by cohabitation, is sufficient to constitute a valid marriage, and to subject them to legal penalties for a disregard of its obligations": *State v. Hughes*, 35 Kan. 626-630; 57 Am. Rep. 195. The subject of evidence of marriage in prosecutions for bigamy and kindred crimes is treated in notes to *State v. Hodgskins*, 36 Am. Dec. 745-751; *Cameron v. State*, 48 Am. Dec. 115-117; *State v. Johnson*, 93 Am. Dec. 254.

BIGAMY—EVIDENCE TO CONVICT.—On the trial of an indictment for bigamy an actual marriage or marriage in fact must be clearly proved in both the first and second instances by direct evidence: *State v. Johnson*, 12 Minn. 476; 93 Am. Dec. 241, and note. In a prosecution for bigamy there can be no conviction where the evidence as to the first wife showed only that she was alive three years before the second marriage: *People v. Feilen*, 58 Cal. 218; 41 Am. Rep. 258.

BIGAMY—EVIDENCE OF MARRIAGE.—On a prosecution for bigamy the first marriage may be shown by proof of admissions, cohabitation, and repute: *State v. Hughes*, 35 Kan. 626; 57 Am. Rep. 195, and note; *Halbrook v. State*, 34 Ark. 511; 36 Am. Rep. 17, and extended note; *Commonwealth v. Jackson*, 11 Bush, 679; 21 Am. Rep. 225; *Dumas v. State*, 14 Tex. Ct. App. 464; 46 Am. Rep. 241; *Parker v. State*, 77 Ala. 47; 54 Am. Rep. 43; *State v. Hilton*, 3 Rich. 434; 45 Am. Dec. 783. See, also, the extended notes to *Cameron v. State*, 48 Am. Dec. 115, and *State v. Hodgskins*, 36 Am. Dec. 745.

BIGAMY.—WIFE AS WITNESS IN PROSECUTIONS FOR: See the extended note to *State v. Johnson*, 93 Am. Dec. 255.

HOGUE v. CORBIT.

[156 ILLINOIS, 540.]

ATTACHMENT—AFFIDAVIT DEFECTIVE, WHEN NOT VOID.—An affidavit in attachment stating the names of the parties, the amount of indebtedness, that defendant has concealed himself to avoid service of process, and that his whereabouts are unknown, though defective in failing to state the nature of the indebtedness, the defendant's place of residence, or that such place is unknown, or cannot, upon diligent inquiry, be ascertained, is voidable, but not void, and is sufficient to give the court jurisdiction of the subject matter.

PROCESS.—ACTS DONE UNDER ERRONEOUS OR VOIDABLE PROCESS ARE BINDING, and cannot be successfully assailed except by a direct proceeding.

PROCESS—COLLATERAL ATTACK.—Acts done under voidable process cannot be attacked by a stranger thereto in a collateral proceeding.

OFFICERS—PRESUMPTION—COLLATERAL ATTACK.—If the legality of the acts of a public officer are questioned collaterally he is presumed to have done his duty.

OFFICERS—PRESUMPTION—COLLATERAL ATTACK.—If the return of a sheriff shows that he has levied on certain designated property, it is presumed, on collateral attack, that such property belonged to the judgment debtor, although that is not shown by the return.

PROCESS—RETURN—DATE OF.—The return of an officer to process is not simply his indorsement thereon, but is the actual placing it in the office from which it issued, and the file mark of the clerk indicates the date of the return.

ATTACHMENT LIEN.—FAILURE OF OFFICER TO MAKE RETURN on or before the return day does not affect the lien of the plaintiff under an attachment.

JUDGMENT RECORD—AMENDMENT.—The court may, on proper notice, at a term subsequent to the rendition of judgment, correct manifest mistakes of the clerk in making up the record.

ATTACHMENT LIEN.—A GENERAL PERSONAL JUDGMENT against defendant in attachment, upon personal service, does not quash the lien of the attachment levied upon his property, although, after judgment, another levy is made upon the same property under the special execution awarded on the judgment.

Crawford & Dodd, for the appellant.

Karraker & Lingle, for the appellee.

⁵⁴² **BAKER, J.** This is ejectment for eighty acres of land, prosecuted in the Union circuit court by Emma E. Corbit, appellee, against L. P. Hogue, appellant. A trial resulted in judgment for the former, and from that judgment this appeal was taken.

The parties claim from a common source of title—one Edwin W. Thornton. On November 15, 1887, appellee sued out of said circuit court a writ of attachment against the real and personal estate of said Thornton, returnable to the March term, 1888, of said court. Upon the same day the sheriff levied the writ upon the land in controversy, and filed a certificate of the levy with the recorder ⁵⁴² of the county. At the March term, 1888, the cause was continued. There was personal service on Thornton to the September term, 1888, and he filed pleas. A trial was had at the March term, 1889, upon the issue joined between the parties to the attachment suit, and a judgment was rendered in favor of appellee and against Thornton, for one thousand and ninety-one dollars and sixty-six cents, and costs. The title of appellee exhibited in this ejectment suit is based on a sale made in satisfaction of that judgment. Appellant relies upon alleged defects in the attachment suit and proceedings, and upon a title which had its origin in a deed from Edwin W. Thornton to his brother, Richard Thornton, which was acknowledged

before a notary public on November 18, 1887, and filed for record on that day.

The statute (Rev. Stats., c. 11, sec. 9) provides that when a writ of attachment is levied on real estate a certificate of the levy shall be filed with the recorder of the county where the land is situated, and that such levy shall take effect, as to creditors and bona fide purchasers without notice, from and after the filing of the same, and not before. Here, as we have already seen, the attachment writ in the suit against Edwin W. Thornton was levied on the land, and a certificate of the levy filed with the proper recorder on the fifteenth day of November, 1887, whereas the deed from said Thornton was not filed for record until the eighteenth day of said November, which was three days after the lien of the attachment levy had become effective.

It is urged, however, that on account of various alleged irregularities and defects in the attachment proceedings the levy in the attachment suit never did become a lien, or even if it did, was not so availed of in the subsequent proceedings as to accrue to the benefit of appellee by means of the sheriff's deed that was afterward executed to her. The objections insisted upon in that behalf are quite numerous.

544 The affidavit for attachment was very manifestly defective, and not in conformity with the requirements of the attachment act. It did not state the nature of the indebtedness for which the suit was brought, nor did it state either the place of residence of the defendant, or that it was not known, or that the plaintiff, upon diligent inquiry, had not been able to ascertain the same. It did state, however, the names of the parties, the amount of the indebtedness after allowing all just deductions, that the defendant had concealed himself so that process could not be served upon him, and that the plaintiff did not know his whereabouts and postoffice address. The statute expressly makes provision for the amendment of affidavits for attachment. Here it is evident that there was an attempt to comply with the requirements of the statute, though some of these were omitted and others defectively stated. The affidavit, under the statute and under the doctrine of *Booth v. Rees*, 26 Ill. 45, and other cases, was clearly amendable. The validity of the writ depended upon the validity of the affidavit, and the affidavit, it being amendable, was voidable merely, and not void: *Bassett v. Bratton*, 86 Ill. 152. The affidavit, the writ, and

the levy of that writ gave the court jurisdiction over the subject matter of the attachment. A thing that is voidable has force and effect, but in consequence of some inherent quality or defect it is liable, upon proper steps being taken, to be legally annulled or avoided, but the steps to avoid it must be taken by the proper party and by means of a direct attack upon it. Here, Hogue, the appellant, was a stranger to the attachment suit, to the affidavit and the writ that was levied, and to the judgment that the court, with full jurisdiction of both the subject matter and the parties to the litigation, afterward rendered, and he cannot, in this collateral action, call in question and impeach this writ and affidavit, which are not null and void, but endowed with force and vitality: See *Durham v. Heaton*, 28 Ill. 264; 81 Am. Dec. 275, and ⁵⁴⁵ authorities there cited. In the case just named this court said that acts done under erroneous or voidable process are binding, and cannot be successfully assailed except by a direct proceeding.

It is urged that no valid levy of the attachment writ was made on the land, because neither the levy indorsed on the writ nor the certificate of levy filed states whose property was levied on. The levy made by the sheriff was as follows: "By virtue of the within writ of attachment I have levied on the east half of the northeast quarter of section twelve (12), township twelve (12) south, range 1, east of the third principal meridian, Union county, Illinois, November 15, 1887." The command of the writ to the sheriff was that he should "attach . . . the estate, real or personal, of the said Edwin W. Thornton" to be found in his county, and the sheriff made return that by virtue of that writ of attachment he had levied on certain designated property. He had no authority, under the writ, to levy upon any property other than that of said Thornton, and it would have been a violation of official duty, and a tort, for him to have done so. The rule is, that where the legality of the acts of a public officer are brought collaterally in question, he is presumed to have done his duty: *People v. Auditor of Public Accounts*, 2 Scam. 567; *Harlow v. Birger*, 30 Ill. 425; *People v. Newberry*, 87 Ill. 41. And see, also, *Ballance v. Underhill*, 3 Scam. 453; *Lieb v. Henderson*, 91 Ill. 282, and *People v. Walsh*, 96 Ill. 232; 36 Am. Rep. 135.

There is no express requirement in the statute that the return shall state, in terms, that the property levied on is the

property of the defendant in attachment: Rev. Stats., c. 11, secs. 8-10. While it is the better practice that it should appear in words, from the return, that the property attached was the property of the defendant or levied upon as his property, yet the omission of such express words would not, at all events in a collateral suit, invalidate a title the basis of which is the levy.

⁵⁴⁶ The concluding portion of the indorsement made and signed by the sheriff that appears on the writ of attachment is, "and return Edwin W. Thornton not found in my county, November 15, 1887." The writ was returnable on March 5, 1888. The filemark shows that it was filed with the clerk on March 8, 1888—three days after the return day. The return of an officer to process is not simply his indorsement upon it, but is the actual placing of it in the office from which it was issued, and the filemark of the clerk indicates the date of the return: *Nelson v. Cook*, 19 Ill. 440; *Cariker v. Anderson*, 27 Ill. 358. We agree with counsel that the date of the filemark in this case as to be taken to be the date of the sheriff's return, but we do not sustain their contention that because the writ was not returned by the sheriff until after the return day, therefore the levy and the attachment failed. The rule is, where there is no peculiar statute to the contrary, that the failure of the officer to make return on or before the return day will not affect the lien of the plaintiff under the attachment: *Drake on Attachment*, 7th ed., sec. 204, and authorities cited in note 3.

The judgment in attachment was rendered at the March term, 1889, and, at the succeeding September term of the court, in a proceeding by appellee against Edwin W. Thornton and Hogue, the appellant here, to amend and correct said judgment and the special execution issued thereon, it was ordered that said judgment, as entered of record, should be amended by striking out the word "defendant" and inserting the word "plaintiff," in the next to the last line of the judgment, so that the last lines of said judgment should read as follows: "Ordered, that the plaintiff have a special execution on said judgment." And it was further ordered that the special execution should be corrected by striking out "the eleventh day of March, A. D. 1889," in giving the date of the issuing of the writ of attachment, and by inserting "the fifteenth day of November, A. D. 1887," and by striking out ⁵⁴⁷ the word "eleventh," and inserting in the special execu-

tion the word "nineteenth," in giving the date of the judgment. The amendments ordered to be made were mere corrections of manifest mistakes and negligences of the clerk of the court in making up the record of the judgment and in issuing final process, and there was ample, even superabundant, material in the record to amend by. The judgment in the attachment suit, as it stood after the amendment substituting "plaintiff" for "defendant" in its last sentence, was, in part, as follows: "Therefore, it is considered by the court that the plaintiff do recover a judgment for one thousand ninety-one and $\frac{66}{100}$ dollars damages, together with her costs in and about this suit expended, and she shall have execution therefor. It is ordered that the plaintiff have a special execution on said judgment."

As we understand the last of the claims that is urged by appellant, it is that the judgment was only a general and personal judgment against the defendant, and only became a lien on property of the defendant from and after March 19, 1889, the date of its rendition; and that since the judgment did not specifically order the sale of the property levied on under the attachment writ, the personal judgment operated to quash the attachment and release the property that had been levied on. This claim is without merit. There was personal service on and appearance by Thornton. In that state of the record the plaintiff was entitled to, and in fact recovered, a judgment *in personam*. The statute (c. 11, sec. 34) expressly provides that in such case "execution may issue thereon, not only against the property attached, but other property of the defendant." And in the judgment in question the court, in furtherance of the statute, not only awarded "execution" for the damages and costs, but also made an additional order "that the plaintiff have a special execution on said judgment." Neither the writ of attachment nor the levy thereon was ever quashed. ⁵⁴⁸ The attachment was never dissolved, by giving bond or otherwise. The property was never released. The levy still continued to be a lien up to and at the time of the rendition of judgment, and even after final judgment the attachment lien still remained effectual for the purpose of preserving the priority of lien. Such judgment relates back to the levy: *Juilliard v. May*, 130 Ill. 87; *Conn v. Caldwell*, 1 Gilm. 531; *Martin v. Dryden*, 1 Gilm. 187; *Young v. Campbell*, 5 Gilm. 80; *Kerr v. Swallow*, 33 Ill. 379.

The case of *Wasson v. Cone*, 86 Ill. 46, is not here in point. That was not an attachment suit commenced in a court of record under the provisions of the act approved December 23, 1871 (Laws 1871-72, p. 176), but an attachment commenced before a justice of the peace under the provisions of the act in regard to attachments before justices of the peace, approved February 9, 1872 (Laws 1871-72, p. 185), and the case was not controlled by section 34 of the act of 1871, but by sections 8 and 11 of the act of 1872, the last of which sections requires that if judgment be given against the defendant, then the justice of the peace "shall order a sale of the property attached, or so much thereof as will satisfy the judgment and all costs of suit." The fact that in the attachment proceeding now in question the sheriff indorsed a levy upon the land on the special execution neither destroyed nor strengthened the already existing levy and lien. All that was required of him, or that could have force and effect, was that he should carry into execution the mandate of the process that he held.

In the record before us we find no error in the rulings of the circuit court in regard to the admission or exclusion of testimony or otherwise.

The judgment is affirmed.

ATTACHMENT—AFFIDAVIT FOR—SUFFICIENCY OF AND COLLATERAL ATTACK UPON.—These questions are fully treated in the extended note to *Fridenberg v. Pierson*, 79 Am. Dec. 165; and see, further, the note to *Bunneman v. Wagner*, 8 Am. St. Rep. 310.

AN ATTACHMENT LIEN is not forfeited by delay in returning the writ which was issued in February, 1882, and returned in January, 1883, it appearing that the attorneys for the attaching creditor used due diligence and made repeated efforts to procure the return of the writ: *Riordan v. Britton*, 69 Tex. 198; 5 Am. St. Rep. 37.

COURTS—POWER TO AMEND RECORD AT SUBSEQUENT TERM.—A court of record has the power, in both civil and criminal cases, to correct clerical errors existing in the record of a previous term, if the clerk had failed or omitted to correctly record a judgment in fact rendered, and enough appears in other parts of the record, entered at the time of the proceeding of the court, to show clearly that such mistake has been made: *In re Black*, 52 Kan. 64; 39 Am. St. Rep. 331, and note. See, also, the note to *Boyd County v. Ross*, 44 Am. St. Rep. 212.

EVIDENCE.—PRESUMPTION THAT OFFICERS HAVE DONE DUTY.—Public officers are always presumed to perform the duties required of them by law: Note to *Leonard v. Sparks*, 38 Am. St. Rep. 655. Every reasonable presumption will be indulged in favor of sustaining the ministerial acts of officers making judicial or execution sales: Note to *Tacoma Grocery Co. v. Draham*, 40 Am. St. Rep. 910.

MEACHAM v. BUNTING.

[156 ILLINOIS, 586.]

HUSBAND AND WIFE—TRUSTS.—A naked trust in land conveyed to a husband for the use and benefit of his wife is not executed by the statute of uses during the marriage, and the legal title remains in the husband.

HUSBAND AND WIFE—TRUST IN FAVOR OF WIFE.—TENANCY BY CURTESY initiate is created in a husband by a conveyance of land to him for the use and benefit of his wife, if no intention to exclude him from the curtesy is shown.

HUSBAND AND WIFE—ESTATE BY CURTESY.—DIVORCE OBTAINED BY THE HUSBAND for the fault of the wife does not destroy his tenancy by curtesy initiate in land held by him in trust for her use.

ADVERSE POSSESSION.—THE POSSESSION OF A LIFE TENANT is not adverse to the remainderman or reversioner.

ADVERSE POSSESSION SUFFICIENT TO DEFEAT THE LEGAL TITLE must be hostile in its inception, and continue uninterruptedly for twenty years, and must be acquired and retained under claim of title inconsistent with that of the true owner.

HUSBAND AND WIFE—ADVERSE POSSESSION.—The possession of land by a husband as trustee, for the use and benefit of his wife, is not adverse to her, even after he has obtained a divorce. He can claim to hold adversely only by renouncing his title as trustee, surrendering possession, and retaking it.

M. Stoskopf and H. C. Hyde, for the appellants.

H. C. Burchard and J. F. Lyon and Son, for the appellee.

588 WILKIN, J.—Urban D. Meacham and Prudence Geddis were married in 1836. They removed from Wisconsin to Freeport, this state, in 1852, and there lived as husband and wife until 1862. One son born of this marriage in 1836 is still living. On the 29th of November, 1856, the husband purchased of one Sindlinger lots 6 and 7, in block 5, in 589 Wright & Purinton's addition to the city of Freeport, the deed conveying the same to him "in trust for the use and benefit of Prudence Meacham," then his wife. Both went into possession of the property in 1857, and occupied it as a home until 1862, and the husband continued in possession until his death, in January, 1892. In 1864 he obtained a decree of divorce in the circuit court of Ogle county from his wife, and by a second marriage became the father of a daughter, Jessie, and a son, James. The mother of these children resided with the father on the premises until her death, and the children continued to live with him until he died. By a general devise in his last will their father gave these children the title he then held, if any, to the lots. The former wife also remarried, her present name being Prudence

Bunting. In 1893 she brought this action of ejectment in the court below, claiming said property as owner in fee, and making Jessie and James Meacham, with others, defendants. Issue being joined, and a trial by jury, the court directed a verdict for the plaintiff, and entered judgment accordingly. The defendants appeal.

By the pleadings the issue whether plaintiff's right of action was barred by the twenty years statute of limitations is properly raised, and is the controlling question in the case. The parties agree that by the terms of the deed from Sindlinger to Urban D. Meacham the latter became the naked trustee of his wife, Prudence, and that the legal title to the property conveyed would therefore, under the general rule, vest in her by force of the statute of uses. It is also conceded that, inasmuch as she was not sui juris under the law in force at the time the deed was executed, the title did not immediately vest in her, but was left in her husband for her use. But counsel for appellants say the statute took effect, and she became seised of the estate in her own right, upon the dissolution of the marriage, in 1864, and from that time the possession of the husband was adverse, and therefore the statute ⁵⁹⁰ then ran against her. On behalf of the appellee it is contended, that, even if the legal title did vest in her at the date of the decree of divorce, still, by reason of his marriage and the prior birth of issue, her husband took an estate in the property, upon the execution and delivery of the deed from Sindlinger, as tenant by the curtesy initiate, and hence this right of action did not accrue until his death. Opposing counsel insist that it is held the title does not, in such cases, vest in the cestui que trust immediately, for the very purpose of excluding all marital rights of the husband, and therefore Urban D. Meacham never became tenant by the curtesy, and, even if he did, the decree of divorce destroyed that as well as all other marital rights in him. Appellee's counsel also deny that Urban D. Meacham's possession was at any time adverse to her.

1. Did Urban D. Meacham have a life estate in the premises prior to the divorce? If the statute of uses had operated, at the time of the conveyance, to vest the estate in the cestui que trust (the wife), there being issue then born, the husband would have become tenant by the curtesy initiate, precisely as though the deed from Sindlinger had been directly to her; but, being a married woman, the statute of uses

did not execute the trust, and the legal title remained in her husband, the trustee, for her use: *Dean v. Long*, 122 Ill. 447, citing Perry on Trusts, sec. 310. This author says: "If an estate be given to trustees upon a trust for a married woman, for her sole and separate use, . . . the legal estate will vest in the trustees, and the statute will not execute it in the cestui que trust. In all these cases the court will give this construction to the gift, if possible, for if the statute should execute the estate in the married woman, certain rights would arise to the husband which might defeat the intention of the donor. These are not the only words necessary to prevent the estate from vesting. Any words that show an intent to create ⁵⁹¹ an estate or a trust for the sole and separate use of a married woman will have the same effect." Other authorities are to the same effect, and it seems to be the settled rule that where the trust is expressly "for the separate use," or "for the sole use and benefit," of a married woman, courts will not allow the statute to execute it in her, because the effect might be to let in marital rights of her husband, and thereby deprive her of the sole and separate use, contrary to the intention of the party creating the trust. Nevertheless, it is understood that a husband's right to an estate by the curtesy may attach to an equitable, as well as a legal, estate held by his wife during coverture, and there can be no doubt that he may have such right in real estate conveyed to another for her use. Whether she holds the property by a direct conveyance or as the cestui que trust therein, if it appears that the grantor intended to exclude the husband from the curtesy, courts will give effect to that intention: *Pool v. Blakie*, 53 Ill. 495; *Monroe v. Van Meter*, 100 Ill. 347. But the husband can be deprived of his marital rights only when the intention to do so clearly appears: *Carter v. Dale*, 3 Lea, 710; 31 Am. Rep. 660; *Cushing v. Blake*, 30 N. J. Eq. 689; Hill on Trusts, 405; *Steadman v. Pulling*, 3 Atk. 423.

There is nothing in the language of the deed in question to indicate a purpose on the part of the grantor to convey the property for the sole and separate use of Prudence Meacham. In fact, the fair inference is that Sindlinger, the grantor, had no purpose whatever in conveying the lots in trust except to carry out the wish of Meacham, who purchased them. That he, the husband, intended by the words "in trust for the use and benefit of Prudence Meacham" to exclude himself from all right in the property by the curtesy cannot be presumed,

and his conduct after the divorce was wholly inconsistent with any such intention. We think the authorities fully sustain the position that he, at the date of the Sindlinger deed, ⁵⁹² became tenant by the curtesy initiate in the premises. Was that estate destroyed by the decree of divorce? While the evidence does not show the grounds upon which it was obtained, it does appear that it was upon the application of the husband, and must therefore have been rendered, not for his fault, but that of the defendant, his wife. While many cases hold "a divorce *a vinculo* destroys the husband's right to curtesy," they speak of such a divorce as at common law, which rendered the marriage void *ab initio*. Although the only divorce known to our law is "*a vinculo*," it may, under the statute, be granted for causes arising after the marriage, and the decree does not avoid it from the beginning. The marriage is legal until dissolved, and we think rights acquired during its legal existence cannot be destroyed by its dissolution unless the statute so expressly provides. This view is sustained by the case of *Wait v. Wait*, 4 N. Y. 95. The New York statute said: "In case of divorce dissolving the marriage contract for the misconduct of the wife she shall not be endowed." The court of appeals held, where a divorce was granted for any other cause than the misconduct of the wife she was entitled to dower, and said: "A divorce at common law avoided the marriage *ab initio*. It was equivalent to a sentence of nullity under our statute. It placed the parties in the same relation to each other as though there had been no marriage. . . . Until our statute there was no such thing as a divorce which recognized and admitted the validity of the marriage, and avoided it for causes happening afterward. Such a divorce is, alone, the creature of the statute. The principles applicable to a common-law divorce cannot be made applicable to a divorce which admits the validity of the marriage and the rights and obligations resulting from it. The effect of such a divorce must be determined entirely by the provisions of law under whose authority it is granted. The common-law divorce avoided the marriage and all rights and obligations resulting from it. ⁵⁹³ The statutory divorce is limited in its operation, and only affects the rights and obligations of the parties to the extent declared by statute. The marriage being valid, the rights it conferred and obligations it imposed continue where the legislature has failed to interfere. In determining

the question before us, therefore, we are to ascertain the will of the legislature—the intent and effect of the statute under which the divorce in question was granted. When a divorce is under the statute the operation of the decree is wholly prospective. . . . If it was the intention of the legislature that in case of a divorce under the statute the wife should in no event be entitled to dower, why not make the provision general, instead of depriving the wife of dower only in case of her being convicted of adultery? *Expressio unius exclusio alterius.*”

When the decree in question was obtained our statute provided: “If any woman shall be divorced from her husband for the fault or misconduct of such husband, except where the marriage was void from the beginning, she shall not thereby lose her dower nor the benefit of any such jointure, but if such divorce be for her fault or misconduct, she shall forfeit the same; and when a divorce is obtained for the fault and misconduct of the husband, he shall lose his right to be tenant by the curtesy in the wife’s lands, and also any estate granted therein by the laws of this state”: Rev. Stats. 1845, c. 34, sec. 12, title “Dower.” Certainly, it did not take away the husband’s right to be tenant by the curtesy in his divorced wife’s lands, but clearly shows an intention by the legislature to secure him in that right if the divorce was obtained for causes other than his fault or misconduct. As said in *Wait v. Wait*, 4 N. Y. 95, if the legislature intended that in case of divorce, under the statute, the husband should in no event be entitled to tenancy by the curtesy, why not make the provision general, instead of only in case of the divorce being obtained for his fault? The ⁵⁹⁴ husband’s tenancy by the curtesy initiate was not defeated by the decree of divorce in his favor, but terminated only upon his death, and therefore the appellee’s right of action did not accrue until he died, in 1893. The possession of land by a tenant for life cannot be adverse to the remainderman or reversioner: *Mettler v. Miller*, 129 Ill. 630, and cases cited.

We are also of opinion that, without reference to his tenancy by the curtesy, the possession of Urban D. Meacham was at no time adverse to appellee, within the meaning of the statute of limitations. He entered under the Sindlinger deed, and prima facie continued to hold possession under it. If the defendants below, claiming under him, denied that fact, the burden was upon them to prove it, and this they wholly

failed to do. Adverse possession sufficient to defeat the legal title must be hostile in its inception, and continue uninterrupted for twenty years. It must be acquired and retained under claim of title inconsistent with that of the true owner: *Turney v. Chamberlain*, 15 Ill. 271. See, also, *Morse v. Seibold*, 147 Ill. 318, and cases cited. He entered as trustee under the Sindlinger deed, and he could only afterward claim to hold adversely to that title by surrendering the possession and retaking it: *O'Halloran v. Fitzgerald*, 71 Ill. 53; *Reynolds v. Sumner*, 126 Ill. 58; 9 Am. St. Rep. 523. The entry was with appellee's consent, and therefore not adverse: *Timmons v. Kidwell*, 138 Ill. 13. The possession was consistent with the title of the real owner, and "nothing but a clear, unequivocal, and notorious disclaimer and disavowal of the title of such owner would render the possession, however long continued, adverse": *Rigg v. Cook*, 4 Gilm. 336; 46 Am. Dec. 462, followed by *Grand Tower etc. Transportation Co. v. Gill*, 111 Ill. 541.

No other verdict than that which the jury was instructed to return could have been properly rendered in this case.

The judgment of the circuit court will be affirmed.

HUSBAND AND WIFE—HUSBAND AS TRUSTEE FOR WIFE.—A conveyance to a husband for the sole and separate use of the wife constitutes him a trustee for her and for her sole and separate use, confining the trust to the nature of the interest expressly intended to be given to her: *Tenant v. Stony*, 1 Rich. Eq. 222; 44 Am. Dec. 213. To the same effect, see *Hamilton v. Bishop*, 8 Yerg. 33; 29 Am. Dec. 101. See, also, the extended note to *Weeks v. Haas*, 39 Am. Dec. 45.

ADVERSE POSSESSION BETWEEN HUSBAND AND WIFE.—The general rule seems to be that a husband cannot hold adversely to his wife, nor the wife adversely to the husband, premises of which they are in joint occupancy. This doctrine with its exception will be found discussed in the extended note to *Gafford v. Strauss*, 18 Am. St. Rep. 113; and see, also, the note to *Miller v. Baker*, 45 Am. St. Rep. 683.

ADVERSE POSSESSION—WHAT CONSTITUTES.—Adverse possession to defeat the title of the owner of land must be hostile in its inception, and so continue without interruption for twenty years. It must be actual, visible, and exclusive, acquired and retained under claim of title inconsistent with that of the owner: *Downing v. Mayer*, 153 Ill. 330; 46 Am. St. Rep. 896, and note. See, also, the extended note to *Finch v. Ullman*, 24 Am. St. Rep. 388.

ILLINOIS STEEL COMPANY v. O'DONNELL.

[156 ILLINOIS, 624.]

CORPORATIONS—INSOLVENCY—RIGHT TO PREFER CREDITOR.—The directors and officers of an insolvent corporation may dispose of its property in good faith, to pay or secure its debts, even though some creditors are thus given a preference over others.

CORPORATIONS—INSOLVENCY—PREFERRING CREDITOR.—RELATIONSHIP of a creditor to one or more of the directors or officers of an insolvent corporation does not invalidate a transaction by which he is given a preference in the payment of a debt due him from the corporation, provided the transaction is otherwise fair and free from fraud.

INTEREST—WHEN DEDUCTED ON ENTERING JUDGMENT.—Unearned interest paid in advance must be deducted from the amount of recovery, in entering judgment on notes before maturity, at the election and by the voluntary act of the payee.

CORPORATIONS—INSOLVENCY.—Renewal judgment notes given by a corporation subsequent to insolvency are as effective as preferences as the original judgment notes given prior to insolvency.

CORPORATIONS—INSOLVENCY—RIGHT OF OFFICERS TO RECOVER LOANS.—Directors or officers of a solvent corporation, acting in good faith, may deal with it and loan it money and take security therefor, and the subsequent insolvency of the corporation does not affect their rights to recover such loans or enforce their securities.

CORPORATIONS—INSOLVENCY—PREFERENCES TO DIRECTORS OR OFFICERS.—Directors and officers of a financially embarrassed though going corporation, acting in good faith and for the apparent benefit of the corporation, may loan it money, taking security for its repayment, and may enforce payment from such insolvent corporation in preference to its general creditors.

E. P. Prentice, and Williams, Holt & Wheeler, for the appellant.

G. S. House, E. A. Otis, and P. C. Haley, for the appellees.

629 **BAKER, J.** The principal matters for consideration on this writ of error are the claims that the preference given by the insolvent Joliet Enterprise Company to Mary V. Fish was unlawful and invalid, and that the judgment for \$176,420.96, rendered on the thirtieth day of November, 1892, against the Joliet Enterprise Company, and in favor of Henry Fish & Sons, was and is illegal, and should be set aside as an unlawful preference.

On November 30, 1892, the Joliet Enterprise Company was insolvent. At that time, and for some time prior thereto, it was indebted to Mary V. Fish in the sum of \$15,000 for borrowed money, and she held the judgment note of the corporation therefor. She was the mother of Charles M. Fish, George M. Fish, and Henry M. Fish, three of the five direct-

ors of the company. On the day mentioned, the corporation, through its directors and ⁶³⁰ officers, conveyed to her certain real estate in payment of the indebtedness due her, and she accepted the deed in satisfaction of her claim. The value of property conveyed was not greater than the amount of the debt for which it was given.

It is the settled law of this state that the directors and officers of an insolvent corporation have the power to dispose of corporate property, in good faith, for the purpose of paying or securing corporate debts, and that they may do this even though the result is that some creditors are given a preference over others: *Reichwald v. Commercial Hotel Co.*, 106 Ill. 439; *Bouton v. Smith*, 113 Ill. 481; *Burch v. West*, 134 Ill. 258; *Ragland v. McFall*, 137 Ill. 81; *Glover v. Lee*, 140 Ill. 102; *Warren v. First Nat. Bank*, 149 Ill. 9; *Butler Paper Co. v. Robbins*, 151 Ill. 588; *Gottlieb v. Miller*, 154 Ill. 44. And the fact of relationship of the person to whom preference is given, to one or more of the directors or officers of the corporation, does not invalidate the transaction, if it is otherwise fair and free from fraud: *Schroeder v. Walsh*, 120 Ill. 403; *Ragland v. McFall*, 137 Ill. 81; *Gottlieb v. Miller*, 154 Ill. 44; *Blair v. Illinois Steel Co.*, unreported. There was no error in sustaining the validity of the conveyance to Mrs. Fish.

The firm of Henry Fish & Sons was composed of Henry Fish, the father, and his three sons, George M. Fish, Charles M. Fish, and Henry M. Fish, and it was engaged in the banking business at Joliet. The Joliet Enterprise Company was engaged in carrying on an extensive business in the manufacture of barbed wire. Said George M., Charles M., and Henry M. were, as already stated, three, and a majority, of its board of directors. The firm had for some years been loaning large sums of money to the corporation. On the morning of November 30, 1892, the firm held six judgment notes of the company for \$29,000 each, amounting in the aggregate to \$174,000. At that time it was manifest that both the bank and the corporation were insolvent, and that both would be compelled ⁶³¹ to suspend payment. Among other things that were done during the morning of that day a judgment was entered upon said judgment notes in favor of Henry Fish & Sons for \$176,420.96 and costs, and execution immediately issued thereon and a levy made on the property of the corporation. Later in the day the firm of Henry Fish & Sons made a voluntary assignment for the

benefit of its creditors, and James L. O'Donnell, the principal defendant in error herein, became the assignee.

In the decree in equity that was afterward entered in the circuit court of Will county, the judgment by confession was sustained to the extent of \$116,000, and to that extent only, and for the amount of which it was sustained it was given priority. But the court found and decreed that the Joliet Enterprise Company was insolvent on and after March 31, 1892; that while four of the judgment notes were renewals of like notes for loans made prior to said date, yet the other two of said judgment notes, of \$29,000 each, upon which the judgment by confession was based, were for loans made after that date and after insolvency, and that said corporation then had no power to make said two last-mentioned judgment notes, because three of the partners in the banking firm of Henry Fish & Sons were directors and officers of the insolvent corporation. And the court also found and decreed that an attorney's fee of \$1,000 was unlawfully and improperly included in the judgment, and also that \$1,420.96 interest was wrongfully included therein. O'Donnell, the assignee of Henry Fish & Sons, appealed from the decree to the appellate court, and both errors and cross-errors were assigned in that court. The judgment of the appellate court sustained the findings and decrees of the circuit court in regard to the sums of \$116,000 and \$1,420.96, respectively, but reversed its findings and decrees in regard to the two notes of \$29,000 each, and in regard to the attorney's fee of \$1,000. It reversed the decree as to the judgment by confession, and remanded ⁶³² the cause with directions to sustain said judgment for the amount for which the same was entered, except \$1,420.96, which had erroneously been included as interest, and which was ordered to be deducted as of the date of said judgment, leaving said judgment as of such date at the sum of \$175,000, and which judgment, with interest thereon, was ordered to be preserved as a lien upon the property of said Joliet Enterprise Company in favor of said firm of Henry Fish & Sons and their assignee under the judgment, execution, and levy.

It is conceded by all parties that the deduction of \$1,420.96 was properly made from the judgment by confession. It was included in that judgment as interest, whereas the notes were not due at the time of rendition of judgment, and interest on them up to times of maturity had been paid

The judgment also contained another element of double and unlawful interest which a court of equity should correct. Interest had already been paid in advance up to the dates of the maturity of each of the six notes, respectively, and upon the entry of judgment before maturity, at the election and by the voluntary act of the payees of the notes, this unearned interest should have been subtracted. The directions given by the appellate court are so modified as that the just and equitable proportion of the interest paid shall be deducted from the face of the notes and the judgment.

The circuit court in its decree found that the Joliet Enterprise Company was insolvent on the thirty-first day of March, 1892, and from and after that date. For the purposes of the decision we will assume the correctness of this finding.

Four of the judgment notes on which the judgment was based, the principal of said notes amounting to \$116,000, were renewals of other like judgment notes, and represented money actually loaned to the corporation by said banking firm of Henry Fish & Sons, said notes having their origin in loans made and judgment ⁶³³ notes given on December 18, 1890, October 3, 1891, October 31, 1891, and February 16, 1892, respectively. The giving of a judgment note is the giving of a security or preference: *Young v. Clapp*, 147 Ill. 176. Although this may be so, yet there can be no serious question of the propriety of the action of both of the courts below in sustaining the judgment so far as it has for its foundation the four renewal notes mentioned above. The renewal judgment notes were only continuations of the original judgment notes given during the solvency of the company. The substance of the matter is, that each loan of money and judgment note given therefor continued to be one and the same transaction, without reference to the number of like judgment notes given in renewal, and without regard to the fact that the last renewals may have been after corporate insolvency: *Saylor v. Daniels*, 37 Ill. 331; 87 Am. Dec. 250. And the law is, that the directors or officers of a solvent corporation, acting in good faith, may deal with it and loan it money and take security therefor, and that the subsequent insolvency of the corporation will not affect their rights of action to recover such loans or enforce their securities: *Mullanphy Savings Bank v. Schott*, 135 Ill. 655; 25 Am. St. Rep. 401.

The circuit court found that two of the judgment notes,

for \$29,000 each, had their origin in loans made by Henry Fish & Sons to the insolvent company—one on June 13, 1892, and the other on October 4, 1892. It held that the taking of security for such loans, by way of warrants of attorney to confess judgment, or by way of judgment notes, was inequitable and unauthorized as against the creditors of the Joliet Enterprise Company, and forbidden by law, and it therefore set aside and annulled the judgment as to \$58,000, that being the amount of the principal debts secured by said two notes. Upon the appeal of O'Donnell, the assignee of the insolvent firm of Henry Fish & Sons, the appellate court held ⁶³⁴ otherwise in regard to said two notes, as already herein sufficiently appears.

The two loans of money, amounting in the aggregate to \$58,000, were made by the banking firm to the corporation in good faith, and the judgment notes were given therefor at the times that the loans were respectively made. The assets of the corporation were not diminished by the transactions. It got the benefit of the moneys so borrowed, and they were used in completing the new plant that it constructed at a cost of some \$280,000, and in conducting and keeping on its feet its large manufacturing business. The banking firm did not obtain, or anticipate receiving, any advantage to itself by loaning the money to the corporation, other than that of getting interest on the money that it loaned. The corporation, at the time of these transactions, was embarrassed for want of means—in fact insolvent, in the sense that its liabilities exceeded its assets—and it was forced to adopt various temporary shifts and expedients for the purpose of raising money. At the same time it was a going concern; had an extensive plant which had cost it over a quarter of a million of dollars, and was unencumbered; was employing some three hundred workmen; had on hand manufactured products worth about \$200,000, and was doing a large business and meeting its commercial obligations. The securities that were given by the corporation to the banking firm—i. e., judgment notes—were not outside of the usual order of things, for the evidence shows that it was, and for many years had been, the custom and usage of the banking firm to require judgment notes in all cases of actual and absolute loans of money, and that the same custom and usage obtained with all of the other banks and banking firms doing business in the city of Joliet.

There is a marked difference between a case where a mort-

gage or other preference is given by an insolvent corporation to a director or officer to secure a pre-existing ⁶²⁵ indebtedness, and a case like this, where the corporation, though in fact insolvent, in the sense above stated, is a going corporation that is seeking to accomplish the objects of its incorporation, and the security is given to directors for moneys actually and in good faith loaned, at the time the security is given, to such embarrassed corporation, and for its benefit. In *Harts v. Brown*, 77 Ill. 226, the coal company had expended all of its means in sinking a shaft, etc., and owed debts to the amount of from \$23,000 to \$33,000. This court held that the directors had power to borrow money from one of their number and execute to him a mortgage on the corporate property. It was there said (p. 231): "The company had expended all their means, and had failed to realize their expectations, and had reached a point at which the enterprise must be abandoned unless means could be procured to further prosecute the work, and, so far as we can see, there was nothing reckless or unbusiness-like in effecting this loan for the time, at the rate of interest or on the security given. They all seem to be according to the usual course of business." In *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, the corporation became very much embarrassed, and borrowed money from Marbury, who was one of its directors, and secured him by a note and trust deed. The court found that the loan was made in good faith to assist the corporation in its embarrassments, and held that no rule of law prohibited a director from loaning money to the corporation in good faith when it was needed for its benefit, and that such a rule would deprive a corporation of the aid of those most interested in it and most likely to render it assistance.

The views we entertain in respect to the particular matter now under consideration are well expressed in certain language used by Justice Harlan in delivering the opinion of the circuit court of appeals in the late case of *Sutton Mfg. Co. v. Hutchinson*, 11 C. C. App. 320; 63 Fed. Rep. 496. We quote the language referred to, which is as follows: ⁶²⁶ "A corporation is not required, by any duty it owes to creditors, to suspend operations the moment it becomes financially embarrassed, or because it may be doubtful whether the objects of its creation can be attained by further effort upon its part. It is in the line of right and duty when attempting, in good faith, by the exercise of its lawful powers and by the use of

all legitimate means, to preserve its active existence, and thereby accomplish the objects for which it was created. In such a crisis in its affairs, and to those ends, it may accept financial assistance from one of its directors, and by a mortgage upon its property secure the payment of money then loaned or advanced by him, or in that mode protect him against liability then incurred in its behalf by him. Of course, in cases of that kind a court of equity will closely scrutinize the transaction, and in a contest between general creditors and a director or managing officer who takes a mortgage upon its property, will hold the latter to clear proof that the mortgage was executed in good faith, and was not a device to enable him to obtain an advantage for himself over those interested in the distribution of the mortgagor's property: *Richardson v. Green*, 133 U. S. 30, 43; *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 588."

A rule that would prevent directors and officers of financially embarrassed corporations, acting in good faith and for the apparent benefit of such corporations, from loaning them money and at the same time taking from them security for repayment—the terms and the securities being such as are in accord with the usual course of business—would be highly injurious to corporations themselves, and frequently detrimental to the interests of their creditors. The line of demarkation that separates valid from invalid preferences to directors or officers of insolvent corporations lies between already incurred liabilities and liabilities assumed by going corporations at the time the security is given and taken.

627 In our opinion there was no error in the ruling of the appellate court that the judgment notes given for the moneys lent and advanced on June 13, 1892, and on October 4, 1892, were legal and valid securities and preferences, even as against the claims of the general creditors of the corporation. It is not intended, or considered, that anything herein decided or said is in conflict with the decisions in *Beach v. Miller*, 130 Ill. 162, 17 Am. St. Rep. 291, and subsequent cases in line therewith.

Some other and minor objections to the decree are suggested, but we think that a part of them are, in principle, disposed of by what we have already said, and that the others are not well taken, and do not require special notice.

With the slight modification in the directions to the circuit court that has already been adverted to, the judgment

and order of the appellate court are affirmed. The plaintiff in error will pay the costs made in this court.

CORPORATIONS—INSOLVENCY—PREFERENCES TO CREDITORS.—An insolvent corporation has no right to make a preference as between its creditors: *Conover v. Hull*, 10 Wash. 673; 45 Am. St. Rep. 810, and extended note.

CORPORATIONS—INSOLVENCY—PREFERENCES OF DIRECTORS AND OTHER OFFICERS.—This question and the further question of the right of corporate officers to contract with their corporations and enforce their claims is discussed in the extended note to *Conover v. Hull*, 45 Am. St. Rep. 833.

CORPORATIONS—RIGHT OF OFFICERS TO DEAL WITH.—A director or officer of a solvent corporation may deal with it, loan it money, and take security therefor in like manner as a stranger, and the subsequent insolvency of the corporation will not affect such officer's right to recover his loan or enforce his security: *Mullanphy Sav. Bank v. Schott*, 135 Ill. 655; 25 Am. St. Rep. 401, and note.

CASES
IN THE
SUPREME COURT
OF
INDIANA.

CASE v. OWEN.

[189 INDIANA, 22.]

JOINT TENANCY, CONVEYANCE CREATING.—A conveyance purporting to grant real property to A and B jointly creates an estate in joint tenancy under a statute declaring that an estate granted to two or more shall create an estate in common, unless it manifestly appear, from the tenor of the instrument, that it was not the intention to create such estate.

TO A JOINT TENANCY IT IS ESSENTIAL that the tenants have one and the same estate, created by one and the same conveyance, of interests commencing at one and the same time, and held by one and the same undivided possession.

L. O. Clifford, T. J. Kane, and R. K. Kane, for the appellants.

J. A. Roberts and M. Vestal, for the appellees.

22 COFFEY, J. The only question involved in this case relates to the construction of the following deed, viz:

“This indenture witnesseth, That Barney White and Ruth White, of Hamilton county, and state of Indiana, convey and warrant to Lydia Reese and John Reese, jointly, of Hamilton county, in the state of Indiana, for the sum of fifteen hundred ninety-seven dollars and fifty cents, the following real estate in Hamilton county, to wit: [Here follows description.] In witness whereof, etc.”

It is contended by the appellants that, under this deed, Lydia Reese and John Reese took as tenants in common, while the appellees contend that they took as joint tenants.

An estate in joint tenancy is an estate held by two or more tenants jointly, with an equal right in all to share in the enjoyment of the land during their lives. Upon the death of

any one of the tenants, his share vests in the survivors. Four requisites must exist to constitute a joint tenancy, viz: 1. The tenants must have one and the same interest; ²³ 2. The interests must accrue by one and the same conveyance; 3. The interests must commence at one and the same time; 4. It must be held by one and the same undivided possession: 6 Am. & Eng. Ency. of Law, 891.

A joint tenancy can be created in no other way than by purchase, and its distinguishing feature is that of survivorship. The doctrine of joint tenancy is not favored by the American law, and the rules relating to such estates have been greatly modified by statute in most of the states of the union.

Our statute, Revision of 1894, section 3341, provides that all conveyances and devises of land, or of any interest therein, made to two or more persons, shall be construed to create estates in common and not in joint tenancy, unless it shall be expressed therein that the grantees or devisees shall hold the same in joint tenancy and to the survivor of them, or it shall manifestly appear, from the tenor of the instrument, that it was intended to create an estate in joint tenancy.

This statute completely reverses the ancient common-law rule, for joint tenancy was a favorite of the ancient common law, and no special words or limitations were necessary to call it into existence, but, on the other hand, words or circumstances of negation were indispensable to avoid it: Freeman on Cotenancy and Partition, sec. 18. Under this statute, however, it must be created by express words or limitations.

The question for our decision, therefore, is, Does the use of the word "jointly" in this deed have the effect of vesting in Lydia Reese and John Reese an estate in joint tenancy?

²⁴ It is a familiar rule that in construing a deed, as in construing any other written instrument, it is to be considered as a whole, and that effect is to be given to each and every clause and word found in it if that is possible.

As tenants in common are two or more persons who hold possession of any subject of property by several and distinct titles, the word "jointly" can find no place in describing an estate to be held by them.

To hold that this deed created in the grantees a tenancy in common, we would be compelled to strike out and wholly reject the word "jointly." This we are not at liberty to do. Under the well-known rules of construction we are required

to give it effect; and when that is done we are constrained to hold that this deed vested in Lydia Reese and John Reese an estate in joint tenancy: *Barden v. Overmeyer*, 134 Ind. 660; *Thornburg v. Wiggins*, 135 Ind. 178; 41 Am. St. Rep. 422.

As this is in accord with the conclusion reached by the circuit court, the judgment should be affirmed.

JOINT TENANCY—WHEN CREATED.—Where an estate is given to several persons jointly, without any expressions indicating an intention that it shall be divided among them, it must be construed a joint tenancy: *Martin v. Smith*, 5 Binn. 16; 6 Am. Dec. 395. A grant of land to husband and wife “in joint tenancy” makes them joint tenants, and not tenants by the entireties therein, and the interest of each is subject to execution: *Thornburg v. Wiggins*, 135 Ind. 178; 41 Am. St. Rep. 422, and note.

STATE v. WILLIAMS.

[189 INDIANA, 43.]

FORGERY, INDICTMENT FOR, SUFFICIENCY OF.—An indictment charging that an accused did, at a time and place specified, unlawfully, falsely, fraudulently, and knowingly utter, publish, and pass to one B. D., as true and genuine, a certain false, forged, and counterfeit promissory note of the following tenor (setting out the forged note,) sufficiently avers that the defendant knew that such note was false and forged.

A. G. Smith, attorney general, S. E. Cook, prosecuting attorney, and H. C. Underwood, for the state.

43 HOWARD, J. The appellee was found guilty of uttering a forged and counterfeit promissory note with intent to cheat and defraud, as charged in the following count of indictment, to wit:

“And the grand jury, as aforesaid, for a second count, on their oaths, further charge and present that one **44** Philip T. Williams, late of said county, on the — day of January, 1892, at said county and state aforesaid, did then and there unlawfully, falsely, fraudulently, and knowingly utter, publish, and pass to one John G. Price, the agent of Bertha Delorme, and thereby to said Bertha Delorme, as true and genuine, a certain false, forged, and counterfeit promissory note purporting to have been made and executed by said Philip T. Williams, Daniel G. McClarnon, and Levi Arnold, for the payment of money to said Bertha Delorme, which false, forged, and counterfeit promissory note is of the following tenor, to wit [setting out the forged note], with intent, etc.”

On the return of the verdict the appellee filed a motion in arrest of judgment for the reason, as stated in the motion, that "the second count in the indictment, the one on which the verdict is based and returned, is insufficient, defective, and does not charge a public offense." This motion was sustained and the judgment was arrested over the exception and objection of the prosecuting attorney.

Appellee has filed no brief on this appeal, but we learn from the brief of the prosecuting attorney that in the court below counsel for appellee contended that the second count of indictment, on which the conviction was had, "did not allege that the defendant knew the promissory note uttered was false and forged, and on this ground the court arrested judgment."

The second count of the indictment was based upon the concluding clause of section 2354 of the Revised Statutes of 1894 (Rev. Stats. 1881, sec. 2206), relating to the uttering of forged instruments and to the knowledge, which is a necessary element of the crime, and making one guilty who "utters or publishes as true any such instrument or matter knowing the same to be false," etc.

⁴⁵ The allegation in the indictment, as we have seen, is that the appellee "did then and there unlawfully, falsely, fraudulently, and knowingly utter, publish, and pass . . . as true and genuine a certain false, forged, and counterfeit promissory note," etc.

If we understand the contention upon which the ruling of the court was based, it is that the word "knowingly" does not sufficiently express the guilty knowledge necessary to charge the crime of uttering a forged instrument; that it is not enough to allege that the appellee knowingly uttered the forged note, but that it is necessary to allege that he uttered and published a note which he knew to be forged.

In section 1806 of the Revised Statutes of 1894 (Rev. Stats. 1881, sec. 1737), it is declared that "words used in the statute to define a public offense need not be strictly pursued, but other words conveying the same meaning may be used": See *State v. Chandler*, 96 Ind. 591; *Trout v. State*, 111 Ind. 499.

In 1 Bishop's Criminal Procedure, section 504, it is said, that "the word 'knowingly,' or 'well knowing,' will supply the place of a positive averment, in an indictment or declaration, that the defendant knew the facts subsequently stated."

In Bouvier's Law Dictionary the same statement is made. In Black's Law Dictionary it is said that the use of the word "knowingly" in an indictment is equivalent to an averment that the defendant knew what he was about to do, and with such knowledge proceeded to do the act charged. In 1 Greenleaf on Evidence, section 53, the phrase "knowingly uttering a forged document" is used to express the guilty knowledge of the defendant. In Gillett's Criminal Law, section 449, and in Moore's ⁴⁶ and Elliott's Indiana Criminal Law, section 1236, the same expression is used in the forms of indictment given for uttering counterfeit instruments.

The word "knowingly" is used in a like sense in the cases of *State v. Atkins*, 5 Blackf. 458, and *McGinnis v. State*, 24 Ind. 500.

In 12 American and English Encyclopedia of Law, 522, it is said that "knowingly, in an indictment, is a sufficient averment of knowledge." For a very full discussion of the question, see notes on the same and following pages of the encyclopedia.

The court, in holding the indictment insufficient on motion in arrest, seems to have been governed by an inadvertent ruling in the case of *Powers v. State*, 87 Ind. 97.

In that case there was an affidavit and information in four counts, two charging forgery and two charging the uttering of the forged instrument. The defendant was found guilty as charged in the affidavit and information, but not under any particular count. All the counts were attacked as insufficient on the appeal to this court. The court found the counts for forgery to be good, and that they alone were sufficient to support the verdict. This was all that was needed to affirm the judgment. The court, however, proceeded to examine the remaining counts, being those for uttering the forged instrument, and held them bad, while affirming the judgment on the first two counts.

In the third and fourth counts it was charged, in substance, "that the appellant unlawfully, feloniously, fraudulently, falsely, and knowingly uttered, published, and passed . . . as true and genuine, the false, forged, and counterfeit order, etc."

It was contended that by this allegation it was not charged that the appellant uttered, published, and passed such order, "knowing the same to be false, forged, and ⁴⁷ counterfeit," and this contention the court seems to have sustained.

There is some obscurity in the language used by the court, and in the relation of that language to the wording of the two counts held defective. We are not satisfied from an examination of the opinion that the court intended to hold in that case that "knowingly uttered the counterfeit order" would not convey the same meaning as "uttered the order knowing it to be counterfeit." The counts are not set out in full in the opinion.

However that may be, we are satisfied, both from the authorities which we have cited and from the common and usual meaning given in the English language to the words "knowingly" and "well knowing," that either expression is equivalent to an allegation that appellee "knew the facts subsequently stated"; that he "knew what he was about to do, and, with such knowledge, proceeded to do the act charged."

To "knowingly utter a forged instrument" is, in truth, the usual and ordinary form of expression, and fully avers the guilty knowledge that the instrument was forged.

The judgment is reversed at the costs of the appellee.

FORGERY—INDICTMENT—AVERMENT OF INTENT.—The term "forged" in law indicates a fraudulent intent and purpose in making the writing: *Haskins v. Rulston*, 69 Mich. 63; 13 Am. St. Rep. 376, and note. In charging forgery under section 1191, North Carolina Code, it is only necessary to allege an intent to defraud without designating the person intended to be defrauded: *State v. Cross*, 101 N. C. 770; 9 Am. St. Rep. 53, and note. To sustain an indictment for forgery an intent to defraud must be averred and proved: *Barnum v. State*, 15 Ohio, 717; 45 Am. Dec. 601, and note. See, also, the extended note to *Arnold v. Cost*, 22 Am. Dec. 313.

FITCH v. SEYMOUR WATER COMPANY.

[139 INDIANA, 214.]

MUNICIPAL CORPORATION, ACTION TO RECOVER DAMAGES FOR NONCOMPLIANCE WITH AN ORDINANCE.—If an ordinance of a municipality is a governmental measure which it might enact or not, no liability can arise against the city, or those appointed to carry out the ordinance, in favor of a person suffering from its nonenforcement.

MUNICIPAL CORPORATION—CONTRACT WITH—RIGHT OF A THIRD PERSON TO RECOVER DAMAGES FOR BREACH OF.—If a contract is made between a municipality and a corporation that the latter will furnish water for the extinguishment of fires and other purposes, a private citizen cannot recover of such corporation for damages sustained by him for the breach of its contract with the city.

W. K. Marshall, D. J. Schuyler, W. Olds, R. Applewhite, and J. F. Applewhite, for the appellant.

M. Moores and O. H. Montgomery, for the appellee.

¶²¹⁵ HOWARD, J. The appellant brought this action against the Seymour Water Company, charging that he was a citizen and taxpayer of the city of Seymour; that the defendant company was supplying the city with water under a contract which provided that the company "shall constantly, day and night, except in cases of unavoidable accident, keep all of the city hydrants supplied with water, and, upon receiving a fire alarm, shall at once furnish sufficient pressure for fire service, not, however, to exceed one hundred pounds to the square inch, and shall keep the fire hydrants in good working order and efficiency for fire service"; and was paid at the rate of four thousand dollars per year for the use of one hundred fire hydrants by the city of Seymour; that the appellant, Fitch, was the owner of a building used by him for the manufacture of chewing gum and other articles, and on November 23, 1891, this building was destroyed by fire, with its contents, belonging to Fitch, of the value of more than twenty thousand dollars; that the city of Seymour had in all things fulfilled its contract with the Seymour Water Company as to the payment of rent and other requirements, and that "defendant had machinery, water mains, pipes, and hydrants of sufficient capacity and power to have furnished water in ¶²¹⁶ large quantities, sufficient to have extinguished said fire, before plaintiff's property could have been damaged by said fire more than five hundred dollars, and that defendant owed the duty to plaintiff to furnish water for the extinguishment of said fire as soon as it could possibly be extinguished, and it could have been extinguished within eight minutes after its commencement, and before plaintiff's property had been damaged by said fire more than five hundred dollars, as aforesaid, if defendant had furnished the pressure of water they could and should have furnished"; that the city of Seymour had two fire companies, organized in the state of Indiana, and under the ordinances of the city of Seymour; that it was the duty of said fire companies, as soon as the fire alarm was given, to go immediately and attach hose to a sufficient number of hydrants, and by means of said hose throw the water on said fire; that the alarm of fire was given when said fire was in its incipency, and before much damage had been done

to plaintiff's property; said fire companies went immediately and attached their hose to four different hydrants, which was a sufficient number, and began to throw water on said fire within five minutes after said alarm was given, and could and would have extinguished said fire before plaintiff's property aforesaid had been damaged more than five hundred dollars if they could have had an ordinary amount of pressure that they usually had from such waterworks, and which said waterworks and the machinery had the capacity and power to furnish; and which amount it was the duty of defendant to furnish, but said defendant negligently, carelessly, and wrongfully failed to furnish the usual amount of pressure, and did not furnish one-third the amount said works had the capacity and power to furnish, and by reason of said failure said fire companies could not and ²¹⁷ did not throw water on said fire in such quantities, and with such force as to check said fire.

The defendant demurred to the complaint, and its demurrer was sustained, and, on plaintiff's refusal to amend, judgment was rendered in favor of defendant, and the plaintiff appealed to this court.

The appellant contends that under the facts pleaded and the ordinance, "the relation between the city of Seymour and the defendant was not in the nature of a contract, but was a franchise granted to the defendant by the common council under the powers conferred upon it by the constitution and the laws of the state, and, therefore, has all the binding force of a law, and is, in effect, a statutory enactment."

And that "the obligation of the defendant, therefore, under this ordinance, to the city of Seymour and its inhabitants was not one of contract, but was an obligation created by law, and the duty of the defendant to the city and the inhabitants, including the plaintiff, was a public duty, and one for any breach of which resulting in damage either to the city or its inhabitants (to the plaintiff in the case) the defendant would be liable for such damage."

The appellee holds that "the question is whether water companies, operating under contracts with cities, by which they agree to furnish sufficient water for fire protection, owe such a duty to inhabitants of the cities as to give the inhabitants a right of action against the water company for fire losses occurring through an insufficient supply of water."

And concludes that "the breach of a contract by a water

company to furnish water to a municipality for the extinguishment of fires gives the citizen whose property is destroyed by fire no right of action against the water company."

²¹⁸ The cases cited by appellant to show a right of action in favor of an inhabitant of a municipality against an individual or a corporation for the violation of an ordinance of the municipality enjoining an obligation or a duty upon the individual or the corporation, are chiefly cases under police ordinances, being cases where the municipality is but an instrument for carrying out the behests of the state; or cases under ordinances for the improvement and care of streets, or like duties, being cases where the control of the municipality was such as to impose upon it an obligation which it consequently owed to the inhabitant for a neglect of duty.

But the ordinance in question is not a police regulation, nor one which the municipality was under obligation to enact or enforce. Under the statute the city had a right to enact an ordinance for protection against fire; but it was not bound to do so. In enacting the ordinance the municipality moved in its governmental capacity, in the general interests of the community. As a means to attain its object, the city contracted with the company for a water supply.

The ordinance, therefore, in so far as the inhabitants of the city and public interests generally were concerned, was a governmental measure which the city might take or not take, as seemed best; and no liability existed against the city for a failure to enact the ordinance, or for a failure to see that it was duly enforced. There could, then, be no public duty under the ordinance, the violation of which would render the city or those appointed to carry out the provisions of the ordinance liable to any one who might suffer. This, we think, follows from our decisions: *Brinkmeyer v. City of Evansville*, 29 Ind. 187; *Robinson v. City of Evansville*, 87 Ind. 334; 44 Am. Rep. 770; *City of Lafayette v. Timberlake*, 88 Ind. 330; *Summers v. Board etc.*, 103 Ind. 262; 53 Am. Rep. 512.

²¹⁹ It must be, consequently, that if there is liability on the part of the company it is because of the terms of the ordinance as a contract with the city, in which contract the inhabitants had an enforceable interest. But while the inhabitants were interested in the contract made for their benefit, we do not think that this interest was such as gave the inhabitants the right to sue for its enforcement, or for damages occasioned by a failure to enforce it.

In a like case, that of *Davis v. Clinton Water Works Co.*, 54 Iowa, 59, 37 Am. Rep. 185, the court said: "The city, in exercise of its lawful authority to protect the property of the people, may cause water to be supplied for extinguishing fires and for other objects demanded by the wants of the people. In the exercise of this authority it contracts with defendant to supply the water demanded for these purposes. The plaintiff received benefits from the water thus supplied in common with all the people of the city. These benefits she receives just as she does other benefits from the municipal government, as the benefits enjoyed on account of improved streets, peace, and order enforced by police regulation and the like. It cannot be claimed that the agents or officers of the city employed by the municipal government to supply water, improve the streets, or maintain good order are liable to a citizen for loss or damage sustained by reason of the failure to perform their duties and obligations in this respect. They are employed by the city, and responsible alone to the city. The people must trust to the municipal government to enforce the discharge of duties and obligations by the officers and agents of that government. They cannot hold such officers and agents liable upon the contracts between them and the city": See, also, *Becker v. Keokuk Water Works*, 79 Iowa, 419; 18 Am. St. Rep. 377.

In *Fowler v. Athens City Water Works Co.*, 83 Ga. 219, 20 Am. St. Rep. 313, the court said: "It was held in *Willy v. Mulledy*, 220 78 N. Y. 310, 34 Am. Rep. 536, that the neglect of a duty imposed by statute would give a right of action to any person having a special interest in its performance and injured by the breach. The present case is not based upon the breach of a statutory duty, but solely upon failure to comply with a contract made with the municipal government of Athens. To that contract the plaintiff was no party, and the action must fail for want of the requisite privity between the parties before the court. A case directly in point is *Davis v. Clinton Water Works Co.*, 54 Iowa, 59; 37 Am. Rep. 185. See, also, *Nickerson v. Bridgeport Hydraulic Co.*, 46 Conn. 24; 33 Am. Rep. 1. There being no ground for recovery, treating the action as one *ex contractu*, is it better founded treating it as one *ex delicto*? We think not. The violation of a contract entered into with the public, the breach being by mere omission or nonfeasance, is no tort, direct or indirect, to private property of an individual,

though he be a member of the community and a taxpayer to the government. Unless made so by statute, a city is not liable for failing to protect the inhabitants against the destruction of property by fire: *Wright v. Augusta*, 78 Ga. 241; 6 Am. St. Rep. 256. We are unable to see how a contractor with the city to supply water to extinguish fires commits any tort by failure to comply with his undertaking, unless to the contract relation there is superadded a legal command by statute or express law": See, also, *Phoenix Ins. Co. v. Trenton Water Co.*, 42 Mo. App. 118; *Britton v. Green Bay etc. Co.*, 81 Wis. 48; 29 Am. St. Rep. 856; *House v. Houston Water Works Co.* (Tex. Civ. App., March 16, 1893), 22 S. W. Rep. 277; *Ferris v. Carson Water Co.*, 16 Nev. 44; 40 Am. Rep. 485; *Eaton v. Fairbury Water Works Co.*, 37 Neb. 546; 40 Am. St. Rep. 510.

In *Paducah Lumber Co. v. Paducah Water Supply Co.*, 89 Ky. 340, 25 Am. St. Rep. 536, a contrary view is taken; but while the ²³¹ opinion of the court is a very well considered one, yet we do not feel that its reasonings are sufficient to overcome the strong current of reason and authority in favor of the view which we have taken.

We think that under the facts of the case at bar the water company had undertaken no public duty which would make it liable to appellant, and also that appellant had no privity in the contract of the city with the company.

The judgment is affirmed.

MUNICIPAL CORPORATIONS—LIABILITY FOR FAILING TO ENFORCE ORDINANCES.—A city is not liable for failure to enact or enforce proper ordinances: *Wheeler v. City of Plymouth*, 116 Ind. 158; 9 Am. St. Rep. 837, and note. See, also, the extended note to *Goddard v. Inhabitants*, 30 Am. St. Rep. 379.

CONTRACTS TO SUPPLY CITY WITH WATER—PROPERTY OWNER'S SUIT THEREON.—If a water company contracts with a city to supply water for the extinguishment of fires, and to be answerable for damages resulting from a failure to comply with such contract, a property owner and taxpayer within such city has no contract relations with such water company, and therefore cannot maintain an action against it upon the contract for damages arising from a failure to supply water as agreed upon, though such failure has resulted in the destruction of his property by fire: *Howsemon v. Trenton Water Co.*, 119 Mo. 304; 41 Am. St. Rep. 654; *Eaton v. Fairbury Water Works Co.*, 37 Neb. 546; 40 Am. St. Rep. 510, and note, with the cases collected.

CHICAGO AND CALUMET TERMINAL RAILWAY COMPANY v. WHITING, HAMMOND, AND EAST CHICAGO STREET RAILWAY COMPANY.

[189 INDIANA, 297.]

STREETS.—A STREET RAILWAY IS NOT AN ADDITIONAL BURDEN to that of the general easement in the street, and the owners of the fee are not entitled to damages on account of the construction thereof in the public street.

RAILWAYS, RIGHT OF CROSSING.—A STREET RAILWAY HAS THE RIGHT to cross over the tracks of a steam railway in a public street, subject to no conditions other than those to which the general public is subject in traveling over such streets. Whatever right the steam railway has in the streets is subject to the burden and easement of the public generally, and the street railway, being entitled to the use of that easement, the steam railway's rights are subject to the right of the street railway to use the street.

E. D. Crumpacker and H. S. Boutell, for the appellant.

W. Olds and C. F. Griffin, for the appellee.

297 **MCCABE, J.** This is an appeal from an interlocutory order granting a temporary injunction against the appellant interfering with or preventing the appellee from laying its railway connections over and across the roadbed and right of way of said appellant at the points where the tracks of appellee intersect the tracks of appellant, at the points where appellant's tracks and railway cross the following streets, namely: Hohman street, Gostlin street, and Oak street, in the city of Hammond, Indiana; Forsythe avenue, in the city of East Chicago, Indiana; and Indiana boulevard, a public highway nearly south of Whiting, Indiana; where the tracks of appellee would, if connected, cross the said tracks of appellant.

298 It is assigned for error that the complaint does not state sufficient facts, and that the court erred in granting the temporary injunction.

It appears from the complaint that the appellee is a corporation organized under the laws of the state providing for the incorporation of street railway companies (2 Burns' Rev. Stats. 1894, secs. 5450–5465; Rev. Stats. 1881, secs. 4143–4155), and that in the year 1893 it secured from the mayor and common council of the city of Hammond, Indiana, by ordinance duly enacted, a franchise permitting it to use certain streets in said city, among which are the streets already named, for the purpose of constructing thereon a street rail-

way to be operated by electricity, with all the necessary appliances; that in said year last named the appellee also secured from the city of East Chicago, Indiana, then an incorporated town, and since incorporated as a city, by ordinance duly enacted, a franchise granting to appellee the right and privilege to use certain streets in said town, among them being Forsythe avenue, above named, for the purpose of constructing thereon its said electric street railway; that in the same year it secured from the board of commissioners of Lake county, in said state, by orders duly adopted, a franchise and license granting it the right to use certain public highways of said county, among which is Indiana boulevard, for the purpose of constructing, maintaining, and operating thereon its said electric street railway; all of which licenses and franchises were duly accepted by appellee, and it gave bond in the sum of ten thousand dollars to each of said municipal corporations, conditioned that it would save them harmless on account of any negligence of appellee in the construction or operation of its said street railway; that the purpose of appellee and the purpose of its incorporation was, and is, the construction and operation of an electric street ~~200~~ railway in the said town, now city, of East Chicago, and through the said city of Hammond, Indiana, over certain public highways of the said county of Lake, to and through the village of Whiting, in said county, and thence over certain public highways, the right to use which had been granted by the said board of commissioners, as before stated, to the state line between the states of Indiana and Illinois, at a point on the said Indiana boulevard near the village of Roby; that it has constructed its said street railway, with all its attachments and appurtenances, with the exception of certain railroad crossings at points where its said line of railway crosses the tracks of steam railroad companies upon said public highways hereinafter mentioned; that it has been, and now is, operating all that portion of its said railway in the city of Hammond lying south of the Michigan Central railroad tracks in said city, being about two miles in length, and its entire line is completed from the Michigan Central railroad tracks, in said city of Hammond, to and through the said city of East Chicago, with the exception of the railroad crossings before mentioned; that the appellant is a corporation operating by steam power a line of railway from the city of Chicago, Illinois, into said county of Lake, in the state of

Indiana, passing through said city of Hammond, the said city of East Chicago and the said village of Whiting; that the railroad tracks of said appellant cross the said Hohman street, Gostlin street, and Oak street, in said city of Hammond, and the said Forsyth avenue, in the city of East Chicago, as nearly as may be at right angles, and the said Indiana boulevard at a point near and south of the said village of Whiting, in a direction nearly, if not quite at right angles; that the tracks of said street railway are laid upon, along, and lengthwise with the said streets and public highways aforesaid, and when completed, by the ²⁰⁰ construction of connections or crossings over the tracks of said appellant, it will cross the said appellant's railway tracks at all points where they cross the said streets and public highways; that appellant had refused to permit the said street railway company to connect its said railway tracks by constructing proper railroad crossings and connections where the tracks of appellee cross the tracks of appellant as aforesaid, unless appellee will enter into a contract with appellant agreeing to certain requirements demanded by appellant covering the expense of maintaining gates and flagmen at said points, and the future construction by appellee, at its own expense, of certain devices, commonly known as interlocking switches which may in future be demanded, and will, unless restrained, prevent by force the construction of said crossings, and has threatened to, and will, tear up and remove by force any crossings or connections at said points across its said railway tracks which appellee may succeed in constructing thereat; that by force appellant has made it impossible for appellee to operate its said street railway between the said city of Hammond and the said city of East Chicago, and appellee cannot so operate its said street railway to connect any of said cities or villages aforesaid until said tracks are connected and crossings laid over the tracks of appellant at the points aforesaid; that appellee has a large force of men ready to construct and lay the said crossings, and is now ready and waiting to operate its said road, except the laying of the said tracks across the appellant's tracks; that in the connection of its said railway tracks and the laying of said crossings aforesaid appellee does not propose, nor has it proposed, desired, or intended to in any manner attach or fasten the same or lay the same upon or against any of the railway tracks of said appellant without its consent, but it desires to and will, if protected

by a restraining ³⁰¹ order, lay its said tracks up to the rails of said appellant, and between the same at right angles, therewith forming what is known as "a jump crossing"; that such crossings are in common use by street railway companies; that it will in no manner interfere with, retard, or endanger the running of trains by said appellant, nor will they in any manner interfere with, or restrict its use of said property or lessen the value thereof. Prayer that the appellant be restrained from doing the acts complained of until the further order of the court, and on the final hearing that appellant be perpetually enjoined.

It is the settled law of this state that the public takes only an easement in the streets of a city or town, and if a steam railroad company lays its tracks upon such streets the abutting owner of the fee whose title extends to the center of the street is entitled to recover damages: *Terre Haute etc. R. R. Co. v. Scott*, 74 Ind. 29; *Eichels v. Evansville etc. Ry. Co.*, 78 Ind. 261; 41 Am. Rep. 561; *Cox v. Louisville etc. R. R. Co.*, 48 Ind. 178; *Sharpe v. St. Louis etc. Ry. Co.*, 49 Ind. 296; *Ross v. Faust*, 54 Ind. 471; 23 Am. Rep. 655; *Nelson v. Fleming*, 56 Ind. 310; *Anderson etc. R. R. Co., v. Kernodle*, 54 Ind. 314; *Roelker v. St. Louis etc. Ry. Co.*, 50 Ind. 127. The basis upon which this rule rests is, that the appropriation of the soil over which a street passes for the construction, operation, and maintenance of a steam railway is a new or additional appropriation to that of the easement granted to the public which entitles the abutting owner to such damages as he may sustain thereby: *Cox v. Louisville etc. R. R. Co.*, 48 Ind. 178.

It follows from this that the steam railway which obtains a right of way over a street, and constructs its railway thereon, obtains something more than an easement; it obtains property rights in such right of way, subject only to the right of the public to travel over the ³⁰² street. And the question here presented by challenging the sufficiency of the complaint is whether the same rule applies to street railways, that is, whether the appropriation of a street to the use of a street railway is a new and an additional appropriation, a new and additional burden to that of the easement of the public generally. It is conceded by the appellant that a street railroad is not an additional burden upon the fee in the street, although appellant claims that strong reasons exist against the doctrine. It is conceded, however, that the courts have quite generally held that such use of a street is not an addi-

tional burden; that it is simply an extended use of the right which the public acquired in the first instance.

This concession, we think, admits that the appellant has no cause to complain of the action of the circuit court.

The writer of this opinion seriously doubts the soundness of the rule thus conceded by the appellant. It is true street railway corporations as a component part of the general public have a right to the use of the public streets of a city or town for the purposes of ordinary travel over them in the same way that any other portion of the general public may enjoy that right. But when they obtain a right of way over such streets to lay down their tracks on such streets they obtain and secure a right and an interest in the street that the general public does not, and cannot, have and enjoy. They obtain to all intents and purposes as much a property right in their right of way in the street attached to the soil as the steam railway laid on such streets. This is so because such companies are authorized to mortgage their corporate property and franchises to secure the payment of loans of money to the corporation. Such power necessarily carries with it power to sell such property and ³⁰³ franchises at sheriff's sale to make the money: 2 Burns' Rev. Stats. 1894, sec. 5473; *New Orleans etc. R. R. Co. v. Delamore*, 114 U. S. 501. How such a right can constitute nothing more than the easement the public has in the street, it is difficult to understand. If the location and operation of a street railway on a public street is no new nor additional burden on the soil, but rests on the easement the public has in the street, then it seems to the writer the company need not obtain any license, permit, or franchise from the municipal authorities to construct its tracks in the public streets of a city. And yet it is the settled law in this and other states that a street railway cannot be laid upon the streets of a town or city without a grant of a license or franchise therefor, either by the municipality or the legislature: *Indianapolis Cable etc. R. R. Co. v. Citizens' etc. R. R. Co.*, 127 Ind. 369; 23 Am. & Eng. Ency. of Law, 946, 947, and authorities there cited. No other part of the public is required to obtain a license or franchise to use or enjoy the easement of the street.

The very fact that a franchise is required to authorize and justify a street railway company to lay down its tracks on a public street seems to the writer a sufficient reason for saying that such was not one of the uses in contemplation when

the street was opened and dedicated. Besides, it is settled law that the street railway company, when once its track is constructed on a street, has rights over that part of the street where its track is located superior to those of the public who enjoy only the easement in the street. For instance, the public must turn off the street railway track when met by the street railway cars: 23 Am. & Eng. Ency. of Law, 990, 991, and authorities there cited.

But the overwhelming weight of authority seems to settle the law, both in this state and elsewhere, that a ³⁰⁴ street railway is not an additional burden to that of the general easement in the street, and that the owners of the fee are not entitled to damages on account of the construction thereof on a public street: *Eichels v. Evansville etc. Ry. Co.*, 78 Ind. 261; 41 Am. Rep. 561; *Indianapolis Cable St. R. R. Co. v. Citizens' St. R. R. Co.*, 127 Ind. 369; *Elliott v. Fair Haven etc. R. R. Co.*, 32 Conn. 579; *Hinchman v. Paterson Horse R. R. Co.*, 17 N. J. Eq. 75; 86 Am. Dec. 252; *Jersey City etc. R. R. Co. v. Jersey City etc. R. R. Co.*, 20 N. J. Eq. 61; *Cincinnati etc. Ry. Co. v. Cummins ville*, 14 Ohio St. 523; *Hobart v. Milwaukee City R. R. Co.*, 27 Wis. 194; 9 Am. Rep. 461; *Attorney General v. Metropolitan R. R. Co.*, 125 Mass. 515; 28 Am. Rep. 264; *Brown v. Duplessis*, 14 La. Ann. 842; *Savannah etc. R. R. Co. v. Mayor*, 45 Ga. 602; *Peddicord v. Baltimore etc. Ry. Co.*, 34 Md. 463; 23 Am. & Eng. Ency. of Law, 954-957, and authorities there cited.

These authorities, and others that might be cited, so firmly settle the rule that it could not now be departed from without serious disturbance of vested property rights. The use of the street by the appellant is subject to the easement in the public, and the burden of keeping the street crossing over its tracks in such a condition as not to impede or obstruct the public easement and use of the street by the public generally is a burden already resting on the appellant. That burden is in no way to be added to or increased by the crossings appellee proposes to construct. So long, therefore, as it is the settled law of this state that a street railway is not an additional burden to that of the easement which the general public has in the street, and that the street railway company's right to use the street is founded on that easement, that long it must be held that the right of such street railway to cross over the tracks of a steam railway laid on such street is subject to no conditions other than those to ³⁰⁵ which the gen-

eral public is subject in traveling over such streets. When the steam railway company obtains its right of way over and along a public street, it does so subject to the right of the general public to use such street and the street crossings over its tracks; and it is generally incumbent on such steam railway company to make such crossings as passable for the general public as they were before the construction of their tracks thereon. The duty, therefore, is incumbent on the steam railway company only to make the crossing as passable as it was before the construction of its tracks thereon for the public generally, or as nearly so as practicable. That does not impose the burden of providing cross-rails and tracks for the street railway to make the crossing. But the street railway is proposing to furnish all that itself, and to be to all the expense of making the crossing and connection.

Appellant contends that this will be a burden and a hindrance to the free and unobstructed use of the appellant's steam railway, which, it is claimed, is a taking of private property without just compensation, in violation of the constitution. True, it is a hindrance and an obstruction to the use of appellant's steam railway. But, having obtained its right of way subject to the burden of the easement in the public generally, and the street railway being entitled to the use of that easement, all the rights appellant obtained in the street for its steam railway were subject to the right of the street railway to use the street. In short, the appellant's rights obtained in the use of the streets for its steam railway were subject to the burden of the appellee's use thereof in the ordinary and proper manner for its street railway.

The complaint shows that appellee was only proposing to use the streets at the crossings in the ordinary ²⁰⁶ and in a proper manner for the construction of street railway crossings, and that it had been hindered and obstructed therein by the appellant in the use of force. It would, therefore, not be a taking of private property without just compensation, because it does not propose to take from appellant anything it ever owned. It never owned its right of way over and across the streets named free from the burden of the public easement, a part of which belongs to the appellee, the street railway. The conclusion we reach is not in conflict with the case of *Indianapolis etc. Gravel Road Co. v. Belt Ry. Co.*, 110 Ind. 5, cited and relied on by the appellant.

In that case the gravel road company was a private corpo-

ration, and the owner of the gravel road before the construction of the Belt railway. The property of the gravel road company was not acquired subject to any easement in the public, or any one else, to construct a railroad across its gravel road. It was there held, very properly, that, while the statute confers upon railroad companies the power to cross highways, and to do so without the payment of compensation so far as the public is concerned, yet that a gravel road company owning its road owns it as anybody else owns his property, and that private property cannot be taken by any one without just compensation, nor, except in case of the state, without such compensation first assessed and tendered: Const., art. 1, sec. 21. And it was there further held that the building of a railroad across such gravel road would be a taking of private property within the meaning of the section of the constitution referred to, on the ground that it was an encumbrance on the property. Manifestly that case has no application here, because the gravel road company acquired its property in the gravel road, not subject to, but free from any easement or encumbrance of any kind whatever. Not ²⁰⁷ so with the appellant, the steam railway company, in the case now before us. As we have already seen, it acquired its rights subject to the easement and encumbrance against which it admits, by its assignment of error, it has made forcible resistance.

The same principle applies to the crossing over appellant's tracks, where they cross Indiana boulevard, a public highway of the county. The statute provides that the county board may grant the right or privilege to a street railway company to use any public highway of the county for its street railway: 2 Rev. Stats. 1894, secs. 5465-5468; Rev. Stats. 1881, secs. 4155-4158.

The right to pass over the highway by the steam railway is subject to the easement of the public, a part of which is owned and enjoyed by the street railway.

We are therefore of opinion that the complaint stated facts sufficient to constitute a cause of action, and that the circuit court did not err in granting the temporary injunction. Therefore, the interlocutory order granting the same is affirmed.

THE CASES OF *Chicago etc. Ry. Co. v. West Chicago etc. Ry. Co.*, 156 Ill. 255, and that of *Pittsburgh etc. Ry. Co. v. West Chicago etc. Ry. Co.*, 156 Ill. 385, presented the same questions as those involved in the principal case. In

each case the complainant, the steam railway company, sought to enjoin the defendant, a street railway company, from laying its tracks upon a public street so as to cross the line of the complainant's steam railway. In the Illinois cases it appeared that the complainant was the owner in fee of the street across which the defendant sought to lay its track, but the court determined, as in the principal case, that the use of the street by the street railway company was not an additional servitude, and therefore that the complainant had no claim to equitable or other relief. The court, in the first of the Illinois cases cited, said:

"But while the case of *Indianapolis etc. Ry. v. Hartley*, 67 Ill. 439, 16 Am. Rep. 624, differs from the case at bar in the fact that there was damage to the abutting property, while here no damage to abutting property is claimed, yet the main distinction lies in the character of the railroad constructed in or across the street. The railroad constructed diagonally across Front street in the case cited was a railroad for the passage of steam-cars carrying freight and passengers, while here the tracks proposed to be constructed across the tracks of plaintiff in error are those of an ordinary street railroad. Ashland and Western avenues, being public streets under the control of the city, are subject to use by the public. The fact that the tracks of plaintiff in error are laid across said streets, and that its freight and passenger cars are permitted by the city to pass over the same upon said tracks, gives plaintiff in error no exclusive use of the crossing, but only a use to be enjoyed in common with the public: *Pittsburg etc. R. R. v. Reich*, 101 Ill. 157. A city has no right to authorize railroad tracks to be laid upon streets so as to exclude the other public uses of a street: *Ligare v. City of Chicago*, 139 Ill. 46; 32 Am. St. Rep. 179. It will not be denied that pedestrians, and carriages and wagons and omnibuses and other vehicles, have a right to pass along these streets over and across the tracks of plaintiff in error. A street-car running upon rails laid upon the surface of the street, and used in the ordinary way, under the regulations of the city authorities, is merely another sort of carriage. The use of a street for a horse railway is such a use as falls within the purposes for which streets are dedicated or acquired by condemnation. The proprietor, when he dedicates the street or is paid for property to be so used, will be presumed to have contemplated such improved and convenient modes of use as are reasonably consistent with the use of the street for ordinary vehicles, and in the usual modes: 2 Dillon on Municipal Corporations, 4th ed., sec. 722.

"The weight of authority is in favor of the position that 'a street railway is not an additional servitude even where the fee of the street is in the abutting owner': 2 Dillon on Municipal Corporations, 4th ed., sec. 723 (574), and cases cited in note 3. It is otherwise in the case of the construction of a steam railroad in a public street; a steam railway is regarded as an additional servitude: 2 Dillon on Municipal Corporations, 4th ed., sec. 725 (576). In his work on Municipal Corporations, Judge Dillon thus clearly states the distinction here indicated: 'The weight of judicial authority undoubtedly is, that where the public have only an easement in streets, and the fee is retained by the adjacent owner, the legislature cannot, under the constitutional guarantee of private property, authorize an ordinary steam railroad to be constructed thereon, against the will of the adjoining owner, without compensation to him. In other words, such a railway as usually constructed and operated is an additional servitude. As to street railroads, constructed in the usual manner and operated under municipal regulation so as not to exclude the

free passage of ordinary vehicles, the almost general, and in the author's judgment the sound, judicial view is, that they do not create a new burden upon the land, and hence the legislature, no matter whether the fee is in the abutter or in the public, is not bound to, although it may, provide for compensation to the adjoining proprietor: 2 Dillon on Municipal Corporations, 4th ed., sec. 725 (576). The courts of most of the states, except those of New York, hold that a street surface passenger railway, constructed at street grade in the usual manner, is not a new servitude upon the land for which the owners of the fee are entitled to compensation: Booth's Street Railway Law, sec. 82. The use of the street by such a street railroad company being within the purposes for which streets are laid out and maintained, the abutting owner can recover no compensation for the damages resulting from such use, whether the fee is in him or in the city, provided the right of ingress and egress and of passage and repassage is left reasonably free to him: Lewis on Eminent Domain, sec. 124; Elliott on Roads and Streets, 528, 529, 558. Streets are laid out in order that the public may enjoy the right of free passage in vehicles as well as on foot, and such vehicles may be carriages running on grooved tracks, or operated in the modes or by the forces which an advanced civilization may require for the general convenience: Pierce on Railroads, sec. 234; Cooley on Constitutional Limitations, 6th ed., 683. The laying of a street railway in the streets of a city, and the running of cars thereon for the transportation of passengers, must be regarded as among the uses contemplated when the street was laid out; hence the owner of abutting land, even though he owns the fee of the street, can only recover damages for such special and material injury as may be shown to have resulted to his property from the construction and operation of such railway: 23 Am. & Eng. Ency. of Law, 954."

STREETS—WHETHER STREET RAILWAYS IN ARE ADDITIONAL SERVITUDE.—The authorized use of a public street for street railway purposes is not the imposition of an additional servitude, and does not entitle the abutting owners along the street to compensation for such use: *Rafferty v. Central Traction Co.*, 147 Pa. St. 579; 30 Am. St. Rep. 763, and note; *Montgomery v. Santa Ana etc. Ry. Co.*, 104 Cal. 186; 43 Am. St. Rep. 89, and note. See, also, the notes to *Jones v. Erie etc. R. R. Co.*, 31 Am. St. Rep. 733; *Western Paving etc. Co. v. Citizens' etc. R. R. Co.*, 25 Am. St. Rep. 478; and *Vanderlip v. Grand Rapids*, 16 Am. St. Rep. 613.

RAILROADS—INTERSECTION IN STREETS.—No railroad company is permitted to claim that tracks, no matter how numerous, when constructed lengthwise on a public street, constitute a part of its yard, so that they may not be crossed by a new railroad when there is reasonable necessity therefor: *Seattle etc. Ry. Co. v. State*, 7 Wash. 150; 33 Am. St. Rep. 866, and note, with the cases collected.

JONES v. CASLER.

[189 INDIANA, 382.]

PROBATE OF LOST OR DESTROYED WILL.—A petition for the probate of a will which alleges that the husband of the decedent after her death knowingly and fraudulently burned and destroyed her will sufficiently avers that it was in existence at the time of her decease.

PROBATE OF LOST WILL — GENERAL ALLEGATIONS OF THE CONTENTS of a lost will, though insufficient under ordinary circumstances to authorize its establishment, are, so far as such allegations disclose its contents, sufficient if it is further alleged that such will has been fraudulently destroyed by the husband of the decedent after her death, and that no copy has been preserved. In such a case to require a copy of the will or the language of the bequests in detail would offer a premium upon the rascality of one whose interest might suggest the destruction of the will.

PROBATE OF PART OF A LOST OR DESTROYED WILL is authorized when the evidence clearly establishes such part, though it does not disclose all the other parts, if the will has been fraudulently destroyed after the death of the decedent by her husband or other person against whose interest the probate of the will is sought.

EQUITY JURISDICTION.—THE PROBATE OF A LOST OR DESTROYED WILL is within the jurisdiction of courts of equity, and if the allegation in a petition for such probate is sufficient to invoke such jurisdiction, it must be sustained, though it omits some allegation specified in the Revised Statutes.

PROBATE OF LOST WILL, PETITION WHEN INSUFFICIENT AS AGAINST ADMINISTRATOR.—If a petition for the probate of a lost or destroyed will shows that the administrator of the husband of the decedent was made a party, but that there was no allegation that he was such administrator or in any manner connecting him with the cause of action, though his name appears in the list of defendants, it is entirely insufficient as to such administrator.

PRACTICE—SPECIAL VERDICTS.—Omissions of essential facts do not vitiate a special verdict, and a motion for a venire de novo will not lie therefor.

PRACTICE.—THE OFFICE OF A MOTION FOR A VENIRE DE NOVO is to secure a new trial for the insufficiency of a verdict, general or special, to support a judgment in favor of either party. The instances are few where the motion may properly be addressed to a special verdict, since by the practice in this state conclusions, opinions, evidentiary facts, and the like, are disregarded, and the facts properly found are alone considered, and if an essential fact is not found it is treated as not proved.

PROBATE OF LOST WILL—PRACTICE.—It is not necessary that a special verdict in favor of the production of a lost or destroyed will should state that the facts found were proved by the testimony of two witnesses, nor that it should disclose the exact words of the will if it states their substance.

PROBATE OF LOST OR DESTROYED WILL.—TWO WITNESSES need not concur in their evidence as to the entire contents of an alleged lost or destroyed will so that the instrument can be reproduced in writing and written out at full length upon the records of probate. It is sufficient that they agree as to the substance of provisions conferring some property right upon devisees or legatees.

PROBATE OF DESTROYED WILL.—SEARCH FOR A WILL after the death of the decedent need not be shown when it is claimed such will was fraudulently destroyed after such death, and there is evidence to support such claim.

PROBATE OF DESTROYED WILL.—A CHARGE TO A JURY that if they find any fact established by the preponderance of evidence they should state such fact in a special verdict, and that the provisions of the will should be clearly proved by two witnesses, or by a copy of the will and one witness, in a proceeding to establish a will alleged to have been fraudulently destroyed, is not subject to the criticism that the jury were charged to find the provisions of the will upon a mere preponderance of the evidence regardless of the number of the witnesses.

JURY TRIAL—CHARGE AS TO CREDIBILITY OF WITNESSES.—An instruction that when witnesses are otherwise equally credible and their testimony otherwise entitled to equal weight, greater weight and credit should be given to those whose means of information were superior and also to those who swear affirmatively to a fact rather than to those who swear negatively or to a want of knowledge or recollection, is improper. The weight to be given to any witness is always a question for the jury.

L. Mock and A. Simmons, for the appellants.

E. R. Wilson, J. J. Todd, F. M. McFadden, and W. H. Eichhorn, for the appellee.

384 **HACKNEY, C. J.** This was a suit by the appellee to establish and probate the last will of Clarissa E. Jones.

By the first paragraph of the complaint it was alleged that said Clarissa died testate, leaving certain real estate; that she left her husband, Jacob Jones, and one child, Anna, surviving her; "that after the death of the said Clarissa Jones, her husband, Jacob Jones, with the fraudulent intent of cheating and defrauding this plaintiff, knowingly and fraudulently, and without the plaintiff's consent, burned and destroyed" the last will of said Clarissa, which had, in the lifetime of said Clarissa, been made, signed, and published in the presence of three named persons who signed said will as attesting witnesses.

It is alleged, generally, that the testator, by said will, devised said lands to said Jacob Jones for and during his natural life, and that "said will further provided that after the death of said Jacob Jones said Clarissa gave and devised said real estate to the plaintiff, Herbert B. Casler, in fee, provided that she, the said Clarissa, should not have a child living at the time of the death of said Jacob Jones."

And said will further provided that if she, the said Clarissa, should have a child, and the child lived and was living at the time of the death of said Jacob Jones, the real estate

was to be divided equally between said child and Herbert B. Casler.

It is also alleged that, by reason of the destruction of the will, the substance thereof only can be given, which, he alleges, is stated as above.

Appellants object to the sufficiency of this paragraph as not alleging that the will was in existence at the time of the death of said Clarissa, and that all of the provisions of the will are not pleaded with clearness and certainty, ²⁸⁵ but that the allegations as to its provisions are conclusions, and not statements of fact.

The allegations of the execution of the will, the intestacy of the testatrix, and the destruction of the will after her death, sufficiently showed the existence of the will at the death of the testatrix. The allegations of the contents of the will are general, and, under ordinary circumstances, would be insufficient; but the facts alleged, if proven as alleged, would certainly authorize the establishment of the will so far as its bequests are concerned. To require that a copy of the will or the language of the bequests, in detail, should be pleaded, where no copy has been preserved and where the memory of witnesses does not hold the exact words, would not only deny the substance for mere form, but would offer a premium upon the rascality of one whose interests might suggest the destruction of the will.

As said in *Anderson v. Irwin*, 101 Ill. 411: "The instrument in controversy having been destroyed without the fault of the defendant in error, . . . and there not appearing to be any copy of it in existence, it would be equivalent to denying the complainant relief altogether to require her to prove the very terms in which it was conceived. All that could reasonably be required of her under such circumstances would be to show in general terms the disposition which the testator made of his property by the instrument that purported to be his will, and was duly attested by the requisite number of witnesses."

In *Allison v. Allison*, 7 Dana, 91, it was said, in speaking of the character and extent of proof required in such a case: "Nor is there any just ground to object to the proof because the witnesses have not given the language of the will, or the substance thereof. They ²⁸⁶ have given the substance of the different devises, as to the property or interest devised, and to whom devised. And we would not stop, in the case of

a destroyed will, to scan with rigid scrutiny the form of the proof, provided we are satisfied of the substance of its provisions."

In *Early v. Early*, 5 Redf. 376, is the following language applicable to this question and to section 2609 of the Revised Statutes of 1881, cited by appellants' counsel: "Section 1865 of the code requires that the provisions of a lost will must be clearly and distinctly proved by at least two credible witnesses, before it can be admitted to probate; but this section must receive a liberal construction: *Hook v. Pratt*, 8 Hun, 102 (109); and its spirit is complied with by holding that it applies only to those provisions which affect the disposition of the testator's property, and which are of the substance of the will."

In our opinion, the first paragraph of complaint was not subject to demurrer for want of sufficient facts in the respects urged by the appellants.

The second paragraph of complaint differs from the first in containing what is alleged to be the substance of the entire will which is embodied in the pleading in the form in which it was drafted.

The objections urged to the first paragraph are urged also to the second, and, for the reasons above stated, must fail. In addition to the objections there urged, it is further claimed that the second paragraph was insufficient in failing to allege the county and state wherein Clarissa E. Jones died. To this proposition is cited section 2580 of the Revised Statutes of 1881. Under that provision of the statute, if the testatrix owned, at her death, the lands devised, and which were alleged to be situated in Wells county, Indiana, the place of her residence or of her death was immaterial, since the location of assets determines ²⁸⁷ the county in which proof of wills may be taken. However, this proceeding comprehends more than the probating of the will; its primary object is to establish the will. The gravamen of the complaint, upon this branch, is the fraud of Jacob Jones in destroying the will. This question is one peculiarly within the equitable jurisdiction of the courts, and does not arise upon, but is simply recognized by, the statute, and some rules of procedure are laid down: *Hall v. Allen*, 31 Wis. 691. Under our code, which strikes down the distinctions, in practice, between actions at law and suits in equity, remedies invoking both jurisdictions may be combined in one proceeding, and the

complaint is not demurrable if it pleads a right within either jurisdiction. It will be seen, therefore, that the complaint is not subject to demurrer if appellant's position were correct upon the proposition that probate of a will is not allowed without the allegations mentioned, since it is not objectionable as invoking the equitable jurisdiction of the court.

On behalf of the appellant Benjamin F. Starr, administrator of the estate of said Jacob Jones, deceased, it is assigned as error, and argued that the complaint did not state facts sufficient to constitute a cause of action. The record discloses that upon application of the appellee the said Starr, as such administrator, was made a party to the action, and was brought into court to answer the complaint; however, there was no allegation in the complaint that he was such administrator, or in any manner connecting him with the cause of action, though his name appears in the list of defendants given in the title of the action at the heading of the first paragraph of complaint.

The appellee now insists that Starr, as administrator, was not a proper or necessary party to the action, and ~~that~~ that no judgment or decree was rendered against him from which this appeal may be prosecuted. The decree simply found the execution and destruction of the will, its provisions, and the death of the testatrix, of her daughter Anna, and of said Jacob Jones, and decreed that said will be established and admitted as probated. The general character of the decree is probably broad enough to preclude all persons who were parties to the record, and that Starr was not a party to the record is not asserted. There was, therefore, a final judgment from which his appeal lies. Was the complaint sufficient, as to Starr, after verdict? Verdicts do not cure defects which consist in the entire omission of facts essential to a cause of action. We cannot escape the conclusion that each paragraph of the complaint was insufficient as to the appellant Starr, administrator.

Upon the return of a special verdict by the jury, the appellants filed their motion for a venire de novo, which motion was overruled, and that ruling is here urged as error. One of the propositions urged is, that the verdict had no finding as to whether the provisions of the will had been proven by two witnesses. Omitted essential facts do not vitiate a special verdict, and motion for a venire de novo will not lie therefor: *Pittsburgh etc. Ry. Co. v. Adams*, 105 Ind. 151; *Board etc. v.*

Pearson, 120 Ind. 426; 16 Am. St. Rep. 325; *Branson v. Studdabaker*, 133 Ind. 147; *Equitable etc. Ins. Co. v. Stout*, 135 Ind. 444.

It is further urged upon that ruling that the special verdict contained conclusions. That some of the findings may be mere conclusions, opinions, or evidentiary facts or circumstances does not admit the motion for a venire de novo, but such improper findings are disregarded: See cases last above cited, together with the following cases cited by the appellants: *Conner v. Citizens' St. Ry. Co.*, ³⁸⁹ 105 Ind. 62; 55 Am. Rep. 177; *Lake Shore etc. Ry. Co. v. Stupak*, 123 Ind. 210.

The office of the motion is to secure another trial because of the insufficiency of the verdict, general or special, to support a judgment in favor of either party. We apprehend that the instances are few where the motion may be properly addressed to a special verdict, since, by the practice in this state, conclusions, opinions, evidentiary facts, and the like, are disregarded, and the facts properly found are alone regarded, and, if an essential fact is not found, it is treated as not proven. It is probably true that the motion will lie where the findings are so uncertain, or ambiguous, or contradictory, that it cannot be determined what was intended to be found upon a material fact or issue, but such an instance is not presented by the record in this case.

The appellants moved also for judgment in their favor upon the special verdict, which motion the court overruled, and of that ruling complaint is here made. Two propositions are urged against that ruling: That the verdict failed to find that the provisions of the alleged destroyed will had been proven by the testimony of two witnesses, and that the findings returned are mere conclusions of the contents of the will, and not the will in form, with signatures of the testatrix and attesting witnesses. Upon these propositions appellants cite section 2609 of the Revised Statutes of 1881, which is as follows: "No will of any testator shall be allowed to be proven or established as lost or destroyed, unless the same shall be proven to have been in existence at the time of the death of the testator, or be shown to have been destroyed in the lifetime of the testator without his consent, or otherwise fraudulently disposed of; nor unless the provisions shall be clearly proven by two witnesses, or by a correct copy and the testimony of one witness."

³⁹⁰ From what we have said as to the character of a pro-

ceeding to establish a will lost or destroyed, it is probable that a trial by jury and special verdict were never contemplated: See, also, *Wright v. Fultz*, 138 Ind. 594. However it may be as to the right of trial by jury in a case like the present, we are unable to observe the necessity for a special finding that proof has or has not been made by the number of witnesses required by the statute. It is the law that a material fact in any cause shall be established by a preponderance of the evidence, and yet it could hardly be said that the jury should return specially their finding that such fact is supported by such weight of evidence. That question, upon the instruction of the court, is submitted to the consciences of the jurors, and when the facts are returned they are presumed to have been found from the requisite evidence. So in the case before us, and if that presumption is discovered to have been erroneously indulged the discovery must be made upon the motion for a new trial.

The second proposition upon the motion for judgment in favor of the appellants rests upon findings of the substance of provisions of the will rather than the exact words and form of the will. We have said, upon the demurrer to the complaint, that the substance is sufficient where the exact words cannot be established, and more certainty in findings cannot be required than is required in pleading or in evidence.

As Thornton says, in his treatise on the law of Lost Wills, page 147: "Swinburn lays it down that the two witnesses need only testify 'to the tenor of the will': 2 Swinburn on Lost Wills, p. 14, pl. 4. By the 'tenor' of a will is meant 'its purport and effect, as opposed to the exact words of it': Rapalje & Lawrence's Law Dictionary, 'Tenor.' So, in the present day, it is enough to prove the substance of the ²⁰¹ will, without proving the precise statement of the language terms used in it: *Allison v. Allison*, 7 Dana, 91; *Davis v. Davis*, 2 Add. Ecc. 223; *McNally v. Brown*, 5 Redf. 372; *Morris v. Swaney*, 7 Heisk. 591; *Wyckoff v. Wyckoff*, 16 N. J. Eq. 401. But the substance, when proved, must show substantially the testamentary intentions of the testator': *Woodard v. Goulstone*, 11 App. Cas. 469."

In the absence of authority we should not doubt the rules thus stated. They are essential to the discovery and effectuation of devises which fraud and deceit would conceal or destroy. If it were otherwise, one whose condition would be

improved by the destruction of a will could throw it in the fire and defy exact proof, which could rarely, if ever, be made. We would not be understood as departing in the slightest from the requirement that the provisions of the will shall be clearly proven, but we do not incline to the rule contended for by counsel for appellant, that such strictness shall be required as would practically defeat the ends of justice and promote the evil intended to be remedied.

Numerous questions are presented in argument upon the overruling of appellants' motion for a new trial, and, before taking them up, we will dispose of an objection by the appellee to a consideration of that ruling upon the ground that the evidence is not properly in the record. On the eighth day of June, 1892, the motion for a new trial was filed and taken under advisement by the court, and, at the same time, the court allowed of record one hundred and sixty days in which to prepare and file bills of exceptions. On the twenty-seventh day of February, 1893, the court overruled the motion for a new trial, and, among other proceedings of that day, the appellants filed their bill of exceptions embodying the evidence. It is now insisted that the time for filing the bill, as allowed by ~~302~~ the court, having expired, the bill was not properly filed.

We have the following provision in section 638 of the Revised Statutes, 1894 (Rev. Stats. 1881, sec. 626): "The party objecting to the decision must except at the time the decision is made; but time may be given to reduce the exception to writing, but not beyond the the term, unless by special leave of court. . . . *Provided*, That if a motion for a new trial shall be filed in a cause in which such decision, so excepted to, is assigned as a reason for a new trial, such motion shall carry such decision and exception forward to the time of ruling on such motion."

The allowance of time by the court did not, and could not, operate to deny the right expressly given by the statute.

In discussing the sufficiency of the evidence to sustain the verdict, it is insisted that under section 2609 of the Revised Statutes of 1881, above quoted, some two witnesses must concur in their evidence of the entire contents of the alleged destroyed will, so that the instrument can be reproduced in writing and be written at full length upon the records of probate.

While conceding that courts of respectable authority have

so held, we have already indicated our conclusion that proof of the substance of the provisions of the will is all that can reasonably be required, and, as to the word "provisions," employed in our statute, we do not understand that it was intended to comprehend all of the terms of the will, including the appointment of executors, the revocation of former wills and the like, but that it was intended to include only those provisions which conferred some property right upon devisees or legatees: See *Wallis v. Wallis*, 114 Mass. 510; *Sheridan v. Houghton*, 6 Abb. N. C. 234; *Vining v. Hall*, 40 Miss. 83. So much of the will would enable the court to judge ^{not} not only of the testamentary intentions of the testator, but to give the will its proper legal construction. No more could be reasonably required.

There are cases which hold that if the devises are proven only in part, those which are proven satisfactorily may be probated: *Dickey v. Malechi*, 6 Mo. 177; 34 Am. Dec. 130; *Burge v. Hamilton*, 72 Ga. 568; *Skeggs v. Horton*, 82 Ala. 352; *Dower v. Seeds*, 28 W. Va. 113; 57 Am. Rep. 646. It is not essential to our conclusion that we should adopt this rule in its application to both lost and fraudulently destroyed wills, but it cannot be objected by a spoliator, who has destroyed the evidence of provisions which may benefit him, that the provisions which have been proven according to law shall not be effective, and this should be especially true where it does not appear that provisions not so fully established would probably modify those provisions which are fully established.

That there was a will executed July 17, 1888, there can be no possible doubt; that Jacob Jones caused a will to be burned, after his wife died, the jury were fully authorized to find from the evidence; that it was the will so executed was supported by evidence, both positive and circumstantial; that the will devised a life estate to Jacob Jones is proven by at least three witnesses, whose evidence varies only in the expression of that evidence; that the fee was devised to the appellee was the reasonable inference from, and construction of, the evidence of three witnesses. It is true that the evidence of the three witnesses does not concur as to the conditions upon which the appellee was to take the fee in the whole of the lands, one stating that the will gave Jacob Jones the option of taking the land and giving to the appellee twelve hundred dollars, a provision not remembered by any other witness. Two of the witnesses agree that the will gave the

fee to the appellee upon the condition that the testatrix ²⁹⁴ had no child which should survive Jacob Jones. There was some difference in the remembrance of the witnesses as to an additional provision of one hundred dollars for the appellee, and as to whether, in addition to the fee, the appellee was to have, with Jacob Jones, a life estate in the land. Two of the witnesses agree that in the event of a child of the testatrix surviving her husband, that child was to share equally the fee with the appellee. In considering the evidence as we have stated it, we have selected such parts of the evidence of the various witnesses as was found most favorable to the conclusions we have stated. This we understand to have been the privilege of the jury, and we are not at liberty to set up the trivial inconsistencies in the evidence of any one witness as neutralizing that which supports the verdict. We may say, therefore, that the provisions of the will, as alleged in the complaint, and as returned by the jury, had the united support of two witnesses, whose credibility was passed upon by the jury and is not in review in this court.

The argument is made that the evidence does not prove a search and failure to find the will, and that, if it had, the legal presumption must arise that the will was destroyed by the testatrix *animo revocandi*. The theory of the case was not that the will was lost, but that it was destroyed after the death of the testatrix; search, therefore, was not consistent with that theory, and the burden was assumed by the appellee, and discharged by the evidence that the will was destroyed, not by the testatrix with the intention to revoke it, but by another.

Complaint is made that the court charged the jury that if they found any fact established by a preponderance of the evidence, they should state such fact in the special verdict. It was also charged that provisions of the will ²⁹⁵ should be clearly proven by two witnesses or by a copy of the will and one witness.

It is not a just criticism of the first of said two charges that the jury were directed to find the provisions of the will upon a mere preponderance of the evidence, regardless of the number of witnesses testifying thereto. The jury could not have failed to understand that while two witnesses were necessary, nevertheless it required a preponderance of the evidence, and that such facts as were so supported should be returned.

An instruction asked by the appellant, that all of the contents of the will should be proven, was modified to direct that the substantial contents of said will should be proven. This modification, in view of what we have already said, was not erroneous:

An instruction in the following language was given: "I instruct you that when witnesses are otherwise equally credible and their testimony otherwise entitled to equal weight, greater weight and credit should be given to those whose means of information were superior, and also to those who swear affirmatively to a fact, rather than to those who swear negatively, or to a want of knowledge, or a want of recollection."

This instruction was copied from Sackett's Instructions to Juries, page 33, and *Blizzard v. Applegate*, 61 Ind. 368, is cited by the author in its support.

The instruction reviewed in the case cited did not so clearly invade the province of the jury as that given by the author, yet it was held to have been improper. The weight to be given to the testimony of any witness or class of witnesses is always a question for the jury, and it is never proper to charge the jury, as a matter of law, that any witness or class of witnesses shall be received with greater consideration than any other: *Woollen v. Whitacre*, 91 Ind. 502; *Cline v. Lindsey*, 110 Ind. 337; ²⁹⁶ *Durham v. Smith*, 120 Ind. 463; *Duvall v. Kenton*, 127 Ind. 178.

For the error in the charge given, the judgment of the circuit court is reversed.

DAILEY, J., did not participate in making this appeal.

WILLS—LOST OR DESTROYED—PROBATE OF PART OF.—The whole of a lost will need not be proved; so much of it as is proved will be admitted to probate: *Dickey v. Malechi*, 6 Mo. 177; 34 Am. Dec. 130.

WILLS—PROBATE OF LOST OR DESTROYED—NECESSITY FOR CONCURRENCE OF TWO WITNESSES.—One witness is sufficient to prove the contents of a lost will: *Dickey v. Malechi*, 6 Mo. 177; 34 Am. Dec. 130, and note; *Matter of Page*, 118 Ill. 576; 59 Am. Rep. 395, and note. The execution of a lost will must be proved by three subscribing witnesses if in life and within the jurisdiction of the court, as in the case of the probate of a will in solemn form: *Kitchens v. Kitchens*, 39 Ga. 168; 99 Am. Dec. 453, and note. See, also, the extended note to *Tynan v. Pascal*, 84 Am. Dec. 630, where this and various other questions relating to the probate of lost wills is discussed.

EQUITY—JURISDICTION OF TO PROBATE LOST OR DESTROYED WILLS.—A court of chancery has jurisdiction to set up a will which has been lost or destroyed: *Buchanan v. Matlock*, 8 Humph. 390; 47 Am. Dec. 622, and

note; *Dower v. Seeds*, 28 W. Va. 113; 57 Am. Rep. 646; *Townsend v. Townsend*, 4 Cold. 70; 94 Am. Dec. 184, and note.

WITNESS.—THE CREDIBILITY OF IS A QUESTION FOR THE JURY: *Prince v. State*, 100 Ala. 144; 46 Am. St. Rep. 28, and note with the cases collected. See, also, *Burney v. Torrey*, 100 Ala. 157; 46 Am. St. Rep. 33, and note.

TRIAL.—SPECIAL VERDICTS: See the notes to *Wightman v. Chicago etc. Ry. Co.*, 9 Am. St. Rep. 783, and *Gulf etc. Ry. Co. v. James*, 15 Am. St. Rep. 752, where it is held that special verdicts must cover all the issues and must not be inconsistent.

CINCINNATI, WABASH, AND MICHIGAN RAILWAY COMPANY v. ANDERSON.

[189 INDIANA, 490.]

EMINENT DOMAIN—TAKING PROPERTY ALREADY DEVOTED TO A PUBLIC USE.—A street may be extended transversely across the right of way of a railway when in doing so the uses for which the right of way is employed are not materially injured, and where such uses and those of a street may coexist without impairment of the first use; but where such uses cannot so exist, or where the first use is destroyed or materially impaired, the second public use will be denied.

STREETS, RIGHT TO TAKE RAILWAY PROPERTY FOR USE OF.—If property already devoted to a public use by a railway corporation is sought to be acquired for part of a public street, the fact that the buildings and structures of the railway may be conveniently located elsewhere is not conclusive in favor of the right to take the land for a street. It is sufficient that the lands sought, and the structures and appliances necessary to be removed, are already devoted to a public use, and that such use of them must be destroyed or substantially impaired by the second public use.

STATUTES, RETROACTIVE OPERATION OF.—A statute, enacted after proceedings to acquire property for use as a public street have been commenced, is not applicable to such proceedings where no step in them has been taken pursuant to such statute.

C. E. Cowgill, J. T. Dye, B. K. Elliott, and W. F. Elliott,
for the appellant.

F. P. Foster and H. C. Ryan, for the appellee.

490 HACKNEY, C. J. This was a suit by the appellant to enjoin the extension of Seventh street, in said city, from the east line of the appellant's right of way westward across the main track and five sidetracks in appellant's yards. Within said yards were an engine-house of brick and stone, containing six stalls, and being sixty feet deep, eighty feet long in front, and one hundred and forty feet long in the rear; in front of this building was a turntable, from which there were six tracks extending into said engine-house and connecting

with six stalls ⁴⁹¹ therein. In said yards was also a water tank from which locomotives were supplied with water, and also a coal dock, constructed from timbers and lumber, the same being twenty-three feet wide by eighty-six feet in length, and from which the locomotives of the appellant were supplied with coal. The various sidetracks within said yards were used for the storage of freight and passenger-cars, and for making up trains, and for reaching said water tank, coal dock, turntable, and roundhouse. Said engine-house was not large enough for the business of the company, and additions were contemplated.

To extend said street as projected would not only inconvenience the appellant in the use of its yards, by meeting the uses of the street by the public and increasing the hazards of its business, but it would take within the lines of said street two of the stalls of said roundhouse and a considerable portion of said coal dock, and would not permit the use of said water tank without encroaching upon said street slightly. Immediately south of the projected street parallel with said tracks and a part of said yard the appellant owned ground upon which such water tank, coal dock, turntable and roundhouse could have been located, and, with changes in some of the sidetracks mentioned, could have been used as conveniently and practicably with the same advantages, excepting the necessity of keeping said projected extension free from standing cars, and the said added hazards by reason of the crossing and recrossing by the public of the appellant's said tracks.

That the uses for which the appellant employed the strip proposed to be taken for the street crossing were of a public character, and that they could not be appropriated to the uses of a public street, if to do so would destroy or become inconsistent with the purposes for which they were so employed, is conceded by the parties.

⁴⁹² The question upon which the controversy hinges, and upon which counsel have placed the case in argument, is this: Can these buildings and structures be destroyed and removed from their fixed location, and their use, where situated, be entirely thwarted, and their location applied to a new public use, upon the showing that they may be rebuilt and conveniently and practicably used for the same purposes on other land of the company near to that now occupied?

Under the general law permitting cities to establish streets,

we have no doubt of the implied power to extend streets transversely across the right of way of a railroad when in doing so the uses for which such right of way is employed are not materially injured or destroyed, and where such uses and those for a street may coexist without impairment of the first uses. But where such uses cannot so coexist, or where the first use is materially impaired or destroyed, it is well settled in this state and elsewhere that the second public use will be denied: *Lake Erie etc. Ry. Co. v. Town of Boswell*, 137 Ind. 336; *City of Fort Wayne v. Lake Shore etc. Ry. Co.*, 132 Ind. 558; 32 Am. St. Rep. 277; *City of Seymour v. Jeffersonville etc. R. R. Co.*, 126 Ind. 466; *City of Valparaiso v. Chicago etc. Ry. Co.*, 123 Ind. 467; *Prospect Park etc. R. R. Co. v. Williamson*, 91 N. Y. 552; *In re City of Buffalo*, 68 N. Y. 167; *In re Boston etc. R. R. Co.*, 53 N. Y. 574; *Albany etc. R. R. Co. v. Brownell*, 24 N. Y. 345; *Milwaukee etc. Ry. Co. v. City of Faribault*, 23 Minn. 167; *Hannibal etc. R. R. Co. v. Muder*, 49 Mo. 165; *Mohawk etc. R. R. Co. v. Archer*, 6 Paige, 83; *St. Paul etc. Co. v. City of St. Paul*, 30 Minn. 359; *New Jersey etc. R. R. Co. v. Long Branch Commrs.*, 39 N. J. L. 28.

At the point of the crossing of the projected extension of Seventh street and the right of way of the appellant there are other public uses existing than the mere maintenance ⁴⁹² of tracks for the transportation of passengers and freight or the storage of cars and the making up of trains. The turntable, the water tank, the engine-house, the coal dock, are each and all not only generally essential to the business and successful operation of a line of railway, but in this instance they were made to serve two divisions of railway, each having a terminus at the city of Anderson, where locomotives were supplied with coal and water, and were housed when not in service. Not only were they essential, but it is not even suggested that they could be dispensed with. That they were of themselves, when connected with the operation of the railway, public uses, not only appears from their necessity to the successful operation of a railway, but from the numerous cases holding that for such uses real estate may be condemned and appropriated under general laws for the appropriation of real estate to railway uses: *In re New York etc. R. R. Co.*, 77 N. Y. 248 (for freight and warehouses); *Low v. Galena etc. R. R. Co.*, 18 Ill. 324 (paint-shops, lumber and timber sheds); *Hannibal etc. R. R. Co. v. Muder*, 49 Mo. 165; and *Chicago etc. R. R. Co. v. Wilson*, 17

Ill. 123 (depot, engine-house, and repair shops); *In re New York etc. R. R. Co. v. Kip*, 46 N. Y. 546; 7 Am. Rep. 385 (depots, car sheds, engine-houses, etc.).

There are probably many other like cases, but we think there can be no doubt upon this conclusion, which finds added support from the cases expressly denying the right to condemn and apply to street crossings property of like character already in use for such purposes by railway companies: *City of Valparaiso v. Chicago etc. Ry. Co.*, 123 Ind. 467; *City of Fort Wayne v. Lake Shore etc. Ry. Co.*, 132 Ind. 558; 32 Am. St. Rep. 277; *Prospect Park etc. R. R. Co. v. Williamson*, 91 N. Y. 552; *Milwaukee etc. Ry. Co. v. City of Faribault*, 23 Minn. 167; *St. Paul etc. Co. v. City of St. Paul*, 30 Minn. 359; *Winona etc. Ry. Co. v. City of Watertown*, 4 S. Dak. 323; ⁴⁹⁴ *New Jersey etc. R. R. Co. v. Long Branch Commrs.*, 39 N. J. L. 28.

The theory of the appellee, and that adopted by the circuit court, is that such buildings and structures are not indispensable, for the reason that they may be conveniently located elsewhere, and, after relocation, the uses of the street and the railway may coexist.

This theory is not new, but, if adopted by any of the adjudged cases, the fact has not been discovered by us; on the contrary, numerous cases have denied it.

In *In re New York etc. R. R. Co. v. Kip*, 46 N. Y. 546, 7 Am. Rep. 385, it was said: "It is claimed that there are other lands in the same vicinity, equally well adapted to the use of the applicant as those sought to be acquired by these proceedings, and which, possibly, might be acquired by purchase from the owners. But such objections to these proceedings are untenable. The location of the buildings of the company is within the discretion of the managers, and courts cannot supervise it."

In *New York etc. Ry. Co. v. Metropolitan etc. Co.*, 5 Hun, 201, it was said: "Upon the point that the lands proposed to be taken are not necessary, because it might be practicable for the respondents to lay their tracks upon their own lands by adopting another curve, we are not prepared to concur with the appellant's counsel. It is not a question of possibilities, nor of strict practicabilities, within the opinion of engineers. No route was ever surveyed for a railroad which was not open to such objections, and, if the right to take lands was to be determined by conflicting evidence whether,

after all, the tracks might not with greater or equal convenience be laid elsewhere, the construction of a road would be attended with the most serious embarrassments. Reasonable necessity must be shown; but a reasonable discretion must be allowed to the officers who locate ⁴⁹⁵ the tracks of a railroad, for it cannot be presumed that the corporation is unnecessarily incurring heavy expenses in obtaining lands, when those it already has would answer its purpose."

In *Eldridge v. Smith*, 34 Vt. 484, it was held that "When land is taken for a legitimate railroad use by the railroad company, the judgment of the officers of the road, unless clearly beyond any just necessity, is regarded as conclusive." We may add that if roundhouses, water tanks, coal docks, or other necessary uses of a railway may be disturbed and relocated, or their location destroyed, it becomes a matter of extreme difficulty, if not an impossibility, to discriminate between such right and the right to require tracks to be removed for the benefit of other public uses; and, further, if the removal of such buildings and structures may be required to appropriate their location to other public uses, it would be difficult to determine why depots should not be subject to the same rule. Another difficulty in adopting the theory contended for by the appellee is, that the rule could not be made to depend upon the proximity of the old to the new location, for if the removal were required, and there was no ground for the new location in the immediate vicinity, public necessity, in pressing its demand for a street crossing, could insist with force that remote situations afforded equal or better facilities for the convenient and safe employment of the uses sought to be superseded.

Without legislative sanction, it is our opinion that such uses cannot be destroyed upon the mere discovery that they may be enjoyed at some place other than the point of their location.

It is suggested that the act of March 6, 1891 (Acts 1891, p. 122), purporting to authorize the removal of buildings and structures of railway companies from the lines of projected ⁴⁹⁶ streets, and permitting the use of crossings at such points, grants the power sought in this case to have been exercised. The proceedings to condemn the crossing were instituted, and the reference of the matter to the city commissioners was as early as December 1, 1890, and said commissioners filed their report of meeting and examination in January, 1891;

this suit was commenced, and the venue changed before the passage of said act. We are unable to find any reason or authority for the suggestion so made. There can be no pretense that any step was taken pursuant to said act. If the act should be considered as affecting the questions in this case it should probably be in the implication thereby, of the legislative determination that without the act no power existed to require the removal of such buildings.

In our opinion the circuit court erred in its finding and judgment, and the appellant's motion for a new trial should have been granted.

The judgment is reversed.

EMINENT DOMAIN.—PROPERTY ALREADY DEVOTED TO A PUBLIC USE CANNOT BE TAKEN for another and different public use, without express legislative authority: *Fort Wayne v. Lake Shore etc. Ry. Co.*, 132 Ind. 558; 32 Am. St. Rep. 277, and note. See, also, the note to *Louisville etc. Ry. Co. v. Whitley County Court*, 44 Am. St. Rep. 222, where the cases and extended notes discussing this question are collected.

STREETS—TAKING RAILROAD PROPERTY FOR.—Railroad companies acquire the right to construct roads subject to the dominant right of the state to cross such roads whenever the public necessity demands that new roads or streets shall be opened; and the general power to open highways or streets carries with it the power to construct them across railroad tracks, subject to the limitation, however, that such crossing must be constructed at a point where the use of the highway will not deprive the railroad company of the use of its tracks: *Fort Wayne v. Lake Shore etc. Ry. Co.*, 132 Ind. 558; 32 Am. St. Rep. 277, and note.

A STATUTE IS RETROACTIVE if it creates a new right rather than affords a new remedy to enforce an existing right: *Commissioners v. Rosche*, 50 Ohio St. 103; 40 Am. St. Rep. 653, and note, with the cases collected.

DORSEY MACHINE COMPANY v. McCAFFREY.

[189 INDIANA, 545.]

CORPORATIONS—CONSPIRACY.—A corporation may become a party to, or a participator in, a conspiracy, and liable for damages resulting therefrom.

CORPORATION—FRAUDULENT INCREASE OF CAPITAL STOCK BY.—If the directors and the holders of the greater number of shares of a corporation, knowing it to be insolvent, enter into a scheme to fraudulently increase its capital stock, representing and pretending that it is not indebted, and that such increase is solely to enable it to enlarge its business, and that it is and has been prosperous and successful, and thereby induce persons relying on these misrepresentations to purchase and pay for such stock, the corporation, as well as the guilty directors and stockholders, is answerable for the damages sustained by such purchasers.

A CORPORATION MAY BE CHARGED WITH ANY WRONG that may be committed through an agent, and held answerable for damages caused by his deceit or false representations.

CORPORATION. — FOR A FRAUDULENT INCREASE OF ITS CAPITAL STOCK A CORPORATION IS ANSWERABLE, because such increase is the act of the corporation.

CORPORATION—LIABILITY OF AFTER EXECUTING AN ASSIGNMENT.—Though a corporation is insolvent and is being wound up by a statutory assignment, it remains liable to persons who have suffered damages from a fraudulent increase of its capital stock.

STATUTE OF LIMITATIONS—FRAUD IN CONCEALING CAUSE OF ACTION.—In suits in equity seeking relief on the ground of fraud, if ignorance of the fraud has been produced by affirmative acts of the guilty party in concealing facts from the complainant, the statute of limitations will not bar relief if the suit was brought within the proper time after the discovery of the fraud. If the fraud is concealed, or is of such a character as to conceal itself, so that the party injured remains in ignorance without any fault or want of diligence on his part, the statute does not begin to run, though there are no special circumstances or efforts on the part of the persons committing the fraud to conceal it from the diligence of the other party.

STATUTES OF LIMITATION—DEMURRER.—If there are exceptions to the period limited by statute in any case, and the complaint shows upon its face that the action was not brought within the time limited, still the question cannot be raised by demurrer to the complaint, unless it also shows that the particular action is not within any of the exceptions to the statute.

CORPORATIONS—PARTIES.—TO AN ACTION AGAINST A CORPORATION FOR CONSPIRACY AND FRAUD IN INCREASING its capital stock and concealing the same through false representations an assignee who is winding up the business of the corporation is a proper, though not a necessary, party, and it is not essential to the maintenance of the suit that the complainant prove that such assignee had guilty knowledge of the conspiracy complained of.

STATUTE OF LIMITATIONS—CONCEALMENT OF CAUSE OF ACTION FOR FRAUD. If the officers and part of the stockholders of a corporation enter into a conspiracy to fraudulently increase its capital stock, and by misrepresentations induce the purchase of such stock, and at the same time state that the object of such increase is to extend and enlarge the business, and that the purchaser need not expect dividends until after three years, this is well calculated to lull him into inaction and to prevent inquiry, and is, therefore, tantamount to a concealment of the fraud.

PRACTICE—STRUCK JURY.—If one of the parties to an action demands a struck jury, and, on being furnished with the requested list of names, refuses to proceed further, the clerk of the court may represent him, and with the adverse party proceed to strike off the names until the proper number of jurors is selected.

C. H. Burchenal and J. L. Rupe. for the appellants.

M. E. Forkner and T. J. Stuy. for the appellee.

DAILEY, J. The facts constituting the plaintiff's cause of action, as shown by the complaint, stated briefly, are sub-

stantially as follows: The Dorsey Machine Company was organized on October ⁵⁴⁷ 14, 1879, with a capital stock of \$60,000, for the purpose of manufacturing and selling reapers and other agricultural implements, and, on October 17, 1881, the stock of the company was increased to \$125,000, up to which time the business of the company had not been prosperous, successful, or remunerative; but, on the contrary, the company had sustained serious loss, and was, at that time, actually insolvent, and unable to pay its debts, and was pressed to the last extremity for money to keep the company going, all of which the appellants, except Warren, who were then the directors and officers of the company, and large holders of the original stock thereof, then well knew. And, knowing the insolvent condition of said company, and its pressing need of money to pay its debts and keep its business from stopping, and recognizing the utter worthlessness of the stock, the defendants Morris, Liebhardt, the Fergusons, and Kinsey, and others, who were directors of the company, together with others who were its stockholders, conspired and confederated together for the purpose of fraudulently increasing the stock of the company, and selling such increase outside of the company for the purpose of paying its debts and keeping it going in apparent prosperity until they could sell and dispose of their own stock, and thereby cheat and defraud those who might purchase such new and original stock, by making certain false representations as to the property, condition, and business of the company, the value of its stock, and the nature and extent of its liabilities.

About January 1, 1882, the plaintiff was unmarried, under the age of twenty-one years, inexperienced and ignorant of business, and under guardianship of one Millikin, who had in his hands, as such, a large amount of money which would come to plaintiff at her majority, on November 7, 1882. Said facts were known to defendant ⁵⁴⁸ Morris, who, for himself and his coconspirators, sought out the plaintiff and importuned her to purchase one hundred shares of said increased stock for the sum of \$5,000; and, to induce her to do so, he, for himself and codefendants and coconspirators, and in pursuance of said conspiracy, falsely and fraudulently represented to her that said company was solvent, and doing a prosperous business; that it was not increasing its stock to pay debts or because it needed money, but to enlarge its business; that the stock represented \$1.37 to every dollar of the

face value of said stock of solvent assets, and its stock was worth \$1.37 to the dollar; that the company had no debts, and had a large surplus, to wit, \$47,000, of solvent assets; that all of said representations were false, and known to be by said Morris and the other defendants. Each one of the facts so represented is specifically negatived, and it is alleged that the company was insolvent, and the stock worthless; that at the time of making said representations said Morris was well known to her, and reputed to be a person of large property and great business capacity and integrity, wherefore she confided in him, and believed in and relied on his representations as being true, and purchased \$5,000 of the stock, for which she gave her note, and afterward paid the same; that no dividends have ever been paid on the stock, and it is worthless; that the company, on December 20, 1888, being insolvent, executed an assignment of all its property to the defendant Warren, for the benefit of its creditors, and the assets in his hands are not sufficient to pay the debts of the company, or any part of its liability to its stockholders. The complaint then goes on to allege certain things done and omitted by the defendants which are said to have prevented the plaintiff from discovering her cause of action, and by which it was concealed from ⁵⁴⁹ her until within the last year, and concludes by claiming damages in the sum of \$8000. The defendants severally demurred to the complaint on the ground that it did not state facts sufficient; which demurrers were severally overruled, and defendants severally excepted. The defendants answered in two paragraphs: 1. General denial; 2. The statute of limitations.

The plaintiff filed a reply to the second paragraph of the answer, the first being a general denial; and the second setting up certain matters by which it was alleged that the plaintiff's cause of action was concealed from her until within the period of six years before the commencement of the action. The defendants demurred to the second paragraph of the reply; which was overruled, and they excepted. The cause was tried by a struck jury, who returned a verdict for the plaintiff in the sum of \$7,568.90, and also returned answers to certain interrogatories propounded to them. Separate motions for a new trial were filed by the defendants, all of which were overruled; and on the twenty-ninth day of March the court rendered judgment against the defendants, except Warren, from which the defendants severally ap-

peal. All the defendants unite in an assignment of errors, four in number. Several of the defendants also make separate specifications of error, but as these cover substantially the same grounds, for convenience we will consider them together. Among the alleged errors discussed by the learned counsel for the appellant is the ruling upon the demurrer to the complaint. They say the demurrer of the Dorsey Machine Company to the complaint should have been sustained. The fraud, if any, was committed by individuals engaged in it, and not by the corporation. The corporation is made up of all the stockholders, all of whom are interested in proportion to the ⁵⁵⁰ amount of their stock. It is not alleged that all of the stockholders engaged in the conspiracy or participated in the alleged fraud, but only that the makers and some others did so. The complaint shows that at the time the conspiracy set forth therein was entered into, the defendants Morris, Liebhardt, Oliver, and Linville Ferguson, Kinsey, Gresh, and Gaines were the directors of said company, and that the defendants in the action, which includes said company, combined, confederated, and conspired together, and, with others, whose names are not known to the plaintiff, but who then held and owned large amounts of the original stock of said company, for the purpose and with the intent to fraudulently increase the capital stock of said company to \$125,000, for the fraudulent purpose of cheating and defrauding those who might purchase stock. And that for said purpose the stock of said company was, on or about the seventeenth day of October, 1881, increased \$65,000, making its capital stock \$125,000. The complaint also shows that said Morris, in January, 1882, was the president of the company, and, while then acting as such, by means of the false and fraudulent representations he then made to the appellee, induced her to purchase of said company one hundred shares of its capital stock, for which the appellee executed to the company her note for \$5,000, which she paid to it on the eleventh day of November, 1882. In our opinion the complaint shows a good cause of action against the company. It is the law that a corporation may become a party to, or participator in, a conspiracy, such as is charged in the complaint, and may be liable for the damages resulting therefrom.

In *Buffalo etc. Oil Co. v. Standard Oil Co.*, 106 N. Y. 669, the court say: "We entertain no doubt that an action against a corporation may be maintained to recover damages caused

by conspiracy ⁵⁵¹ If actions may be maintained against corporations for malicious prosecution, libel, assault and battery, and other torts, we can perceive no reason for holding that actions may not be maintained against them for conspiracy. It is well settled by the authorities cited that the malice and wicked intent needful to sustain such actions may be imputed to corporations."

In *Cragie v. Hadley*, 99 N. Y. 131 (134), 52 Am. Rep. 9, it was said that "a corporation may be, in a legal sense, guilty of a fraud. As a merely legal entity it can have no will, and cannot act at all, but in its relations to the public it is represented by its officers and agents, and their fraud in the course of the corporate dealings is in law the fraud of the corporation."

The proposition is sustained by the authorities that a corporation may be charged with any wrong that may be committed through an agent, and may be held liable for damages caused by his deceit or false representations. In such case the doctrine of ultra vires has no application: Morawetz on Private Corporations, pars. 725, 726; *National Bank v. Graham*, 100 U. S. 699, 702; *Fishkill Savings Inst. v. National Bank etc.*, 80 N. Y. 162; 86 Am. Rep. 595; *American Exp. Co. v. Patterson*, 73 Ind. 430; 2 Wait's Actions and Defenses 837.

Increasing the stock of a corporation is its act, and, like every other act by a corporation, can only be done through the instrumentality of some person acting for or in its behalf; and when the stockholders of the appellate company increased its capital stock, they did so as the agents of and for the company, and the act was that of the company. It is true the complaint does not show that all the stockholders of the company participated in increasing its stock, or in the fraud and conspiracy charged therein, but it does show that a sufficient number of them so engaged to effect the increase under the ⁵⁵² requirements of the law, and when this was done it became the act of the corporation, and rendered it liable for the consequences of such wrongful act. The damage which the appellee sustained by reason of the alleged false and fraudulent representations made by said Morris, as a stockholder and president of the company, to her, and by which she was induced to invest in shares of the stock, is the foundation or gist of the action.

The conspiracy is charged in the complaint for the pur-

pose of holding certain of the appellants liable for the damage the appellee has sustained by reason of the false and fraudulent representations claimed to have been made to her, by which she was induced to purchase said shares of stock, and in the making of which they did not actually participate. But to hold such company liable for the direct and proximate consequences of said representations made by its president and chief officer and agent, for and on behalf of the company while transacting its business, it is not necessary to either charge or prove a conspiracy, because the foundation of the action is the damage done by the violation of her rights, and not the conspiracy. The fact of conspiracy is only matter of aggravation: *Hutchins v. Hutchins*, 7 Hill, 104; *Kimball v. Harman*, 34 Md. 407; 6 Am. Rep. 340; Cooley on Torts, 124, 126.

This is clearly sound doctrine in a case like this, where the company received the money, the fruits of the alleged fraud, and appropriated the same to its use. It is also contended that the complaint is not good as to said company, for the reason that the complaint shows the company is insolvent, and is being wound up under a statutory assignment, and this would preclude a recovery, even if, under the facts stated, the company would have been liable had not insolvency intervened. We are unable to find any authorities in support of this proposition, ⁵⁵³ and think they do not exist. They go no further than to lay down the familiar rule that where a shareholder has been induced to subscribe for stock through the fraud of the company he cannot annul the contract of subscription and recover back what he has paid into it, and thereby free himself from liability, if others in the mean time have acted upon the faith of such subscription; under such circumstances, as between them and the stockholders, responsibility for the fraud attaches to him.

The complaint alleges the insolvency of the company, but it does not state when its unpaid liabilities were contracted, nor can it be inferred from anything contained therein that said liabilities, or any part thereof, were contracted upon the faith of the appellee's subscription. It is needless to say the present suit was not brought by the appellee to annul her contract of subscription, but to recover damages she has sustained by reason of the alleged fraud. The relief sought and obtained in this case is entirely different from that given the shareholder in an action by him, if successful, to annul his

contract of subscription. In the latter action the shareholder recovers back all he has paid into the company, while in the present case the appellee could only recover the amount of damage she has sustained by reason of the fraud so perpetrated, which might be much less than the amount she paid for the stock, or it might be more.

It is lastly urged against the sufficiency of the complaint as to the corporation that it shows the appellee's cause of action is barred by the statute of limitations. In suits in equity where relief is sought on the ground of fraud, the authorities are without conflict in support of the doctrine that where the ignorance of the fraud has been produced by affirmative acts of the guilty party in concealing the facts from the other, the statute will not ⁵⁵⁴ bar relief, provided suit is brought within the proper time after the discovery of the fraud. Also, in suits in equity the decided weight of authority is in favor of the proposition that where a party has been injured by the fraud of another, and such fraud is concealed, or is of such character as to conceal itself, whereby the injured party remains in ignorance of it without any fault or want of diligence on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the person committing the fraud to conceal it from the knowledge of the other party: *Wear v. Skinner*, 46 Md. 257 (265); 24 Am. Rep. 517; *Booth v. Warrington*, 1 Brown Parl. C. 445; *Fisher v. Tuller*, 122 Ind. 31; *South Sea Co. v. Wymondsell*, 3 P. Wms. 143; *Hovendon v. Annesley*, 2 Schoales & L. 634; *Stearns v. Page*, 7 How. 819; *Moore v. Greene*, 19 How. 69; *Sherwood v. Sutton*, 5 Mason, 143; *Snodgrass v. Branch Bank etc.*, 25 Ala. 161; 60 Am. Dec. 505.

It is claimed there could be no exception to the running of the statute as to the corporation. The rule is, that where the limitation in a certain case is absolute, and there are no exceptions to the running of the statute, and the complaint shows upon its face that the action was commenced after the time limited, the question can be raised on demurrer. But where there are exceptions to the period limited by statute in any case, and the complaint shows upon its face that the action was not brought within the time limited, still the question cannot be raised by demurrer to the complaint, unless it also shows that the particular action is not within any of the exceptions to the statute.

The complaint in the case under consideration does not show this. The law in this state is adverse to the contention of the appellant corporation: *Hanna v. Jeffersonville R. R. Co.*, 32 Ind. 113; *Potter v. Smith*, ⁵⁵⁵ 36 Ind. 231; *Harlen v. Watson*, 63 Ind. 143; *Baugh v. Boles*, 66 Ind. 376; *Kent v. Parks*, 67 Ind. 53; *Cravens v. Duncan*, 55 Ind. 347.

At the time the plaintiff's cause of action accrued, she was an infant, and might also have labored under some other supervening disability that arrested the progress of the statute and exempted her from its effect, or she might have rested under divers other legal incapacities, for aught that appears in the complaint. The averments do not show that none of the exceptions existed which prevent the bar of the statute, and the question whether the cause of action is barred cannot be raised by demurrer to the complaint.

It is also claimed by the appellant Dayton H. Warren, assignee of the company, that his demurrer to the complaint should have been sustained, because it is not alleged that he was a party to the fraud. But it is alleged that he is its assignee, and, as such, he must hold the assets that might be affected by any judgment rendered against the company for the payment of its debts and liabilities. In our judgment, the assignee was not a necessary party to the action, but we think he is a proper one.

It is further argued by counsel for the assignee, in support of his demurrer to the complaint, that even if the appellee had a cause of action against the company for fraud, the appellee had no right as against the creditors of the corporation to be compensated out of the assets. This position is based upon the assumption that the unpaid debts and liabilities of the company were contracted after and upon the faith of the appellee's subscription.

This takes too much for granted. There is nothing in the complaint showing the amount of the indebtedness, or when it was contracted, whether before or after ⁵⁵⁶ the increase of the stock, or whether before or after the appellee subscribed for or bought her stock. The inference is just as strong that this indebtedness was contracted prior to the increase of the stock and the purchase by the appellee, as it is that it was contracted after these events. We think this question of little importance.

If the plaintiff had a cause of action, she had a right to have her claim for damages fixed and determined against the

company and all others liable, which could only be done by instituting an action for that purpose, and no question arises now as to her right to share with the creditors of the company in the distribution of its assets. This question can only be presented when the proper proceedings are instituted therefor.

The learned counsel of appellants concede that, "as to the other defendants, the complaint probably states facts sufficient to show a cause of action existing on the seventh day of November, 1882," but insist that the statute of limitations shields them and defeats the remedy. What has been heretofore said in considering the demurrers of the company and the assignee, Warren, applies with equal force to these defendants.

In the second paragraph of the reply to the second paragraph of the answer, the specific acts and facts constituting the concealment are specifically stated, from which it appears that at the time appellee purchased said stock, as alleged in the complaint, the said defendant Morris, for himself and for and on behalf of his codefendants and coconspirators, except the defendant Warren, for the fraudulent, false, and wrongful purpose of concealing from and preventing plaintiff from discovering her said cause of action and the falsity of said representations so made to her by said Morris, and the insolvent condition of said company, and the condition of ⁵⁵⁷ its business affairs, stated to the plaintiff that she need not expect any dividends on her stock for three years; that they intended to increase the business of said company, and the latter would not pay any dividends for that period. All of which statements the plaintiff says she believed to be true, and relied upon them as being true, for which reason she says she did not make any application to said company for any dividends, or make any investigation as to the financial condition of said company during said period.

We think this statement was well calculated to lull appellee into repose, and cause her to make no demand upon or application to the company for dividends during that time. Morris knew she was a minor, inexperienced in business, and could not actively aid in the management of its affairs. Its direct tendency was to effectually obstruct and conceal the only source and channel through which she could receive knowledge of the company's real condition. This is especially so when it is remembered that Morris represented the company as possessed of a large surplus capital and highly

prosperous. The concealment need not be subsequent to the accruing of the cause of action concealed, but may be coincident with it.

In *Boyd v. Boyd*, 27 Ind. 429, after deciding the point that the concealment contemplated by the statute must be something more than mere silence, and that it must be an arrangement or contrivance to prevent subsequent discovery, and must be of an affirmative character, the court say: "But it does not occur to us that it needs to be concocted after the accruing of the cause of action, provided it operates afterward as a means of concealment, and was so intended. In other language, the defendant must not, at any time, do anything to prevent the plaintiff from ascertaining, subsequently to the transaction ⁵⁵⁸ out of which the right of action arises, the facts upon which that right depends, either by affirmatively hiding the truth, enhancing the natural difficulty of discovering it, or by any device avoiding inquiry which would result in discovery": *Bartalott v. International Bank*, 14 Ill. App. 158; *Way v. Cutting*, 20 N. H. 187; *Quimby v. Blackey*, 63 N. H. 77; *Bailey v. Glover*, 21 Wall. 342; 2 Greenleaf on Evidence, par. 448.

In our opinion a party is not bound to presume fraud unless he has notice of facts which would put a reasonable man on inquiry. When, therefore, he has notice of no such facts, he cannot be charged with a want of diligence in not discovering the fraud.

In 1 Yapple's Code Practice and Precedents, 431, the author says: "Where it is provided that the statute of limitations does not begin to run until after discovery, it would seem to be a sufficient averment to bring the case within the saving, to state in the pleading that the party did not discover it until a certain time within the limited period."

The replies of concealment to the statute of limitations in the cases of *Arnold v. Scott*, 2 Mo. 13; 22 Am. Dec. 433; *First Mass. Turnpike Corp. v. Field*, 3 Mass. 201; 3 Am. Dec. 124, and *Homer v. Fish*, 1 Pick. 435; 11 Am. Dec. 218, did not contain any of the averments insisted upon by counsel for the appellant, and yet were held sufficient upon demurrer.

The record shows that the trial of the cause commenced on the fifteenth day of January, 1890, being the last day but one of the November term of the Wayne circuit court, when one of the jurors trying the cause being then sick and unable to attend court and go on with the trial, and would

not be for several days, and the parties being unwilling to proceed without him, and it appearing that, if the juror was present and able to sit, the trial could not be concluded at that term, the court ordered the further hearing of the cause to be adjourned and continued ⁵⁵⁹ until February 10, 1890, the seventh juridical day of the next term thereof, and directed the jury to be present at the time fixed to proceed with the trial. On the day this jury appeared and the trial was resumed. On the eighth day of March they returned their verdict.

It is claimed by the counsel for the defendants that the court had no power or authority to continue the trial of said cause from the 31st of January, 1890, to the tenth day of February, as was done, and to order the attendance of the jury and witnesses at that time, to then conclude the trial thereof.

We think it clear that this action of the court was not prematurely taken and was within the spirit of section 1379 of the Revised Statutes of 1881: Burns' Rev. Stats. 1894, sec. 1442. This statute is a remedial one, intended to prevent mistrials, and should be liberally construed to that end. In relation to the striking of the jury that tried the cause, and the motion of the defendants to quash the venire, the record shows this state of facts: On the 23d of December, 1889, the defendants filed with the clerk their demand for a struck jury to try the cause. The clerk fixed the time of striking the same at 10 o'clock A. M. of December 28, 1889, and so notified the parties. At the time fixed the parties appeared at the clerk's office for that purpose, and thereupon the clerk handed to the attorneys of the defendants a list of forty names on a slip of paper, from which a jury was to be selected; and a like list on a slip to the attorneys of the plaintiff. The list handed to the attorneys of the defendants, they and two of the defendants in person took, and carefully considered and canvassed the names thereon for about an hour, and then informed the clerk and the attorneys of the plaintiff that they would not demand a struck jury, and would withdraw their demand therefor. Thereupon the plaintiff's attorneys demanded that the clerk proceed ⁵⁶⁰ with the striking of the jury as the law requires in such cases, which he and the attorneys of the plaintiff proceeded to do, the clerk first striking out one of the names on the list, and the plaintiff's attorneys then striking out another; and they proceeded and continued to thus alternately strike out one of said

names each, until said clerk had stricken out twelve of said names, and the attorneys of the plaintiff a like number thereof. Afterward, the defendants objected to the summoning of the jury so struck, and asked the clerk not to issue a venire for them, and that the regular panel be recalled to try the cause.

In support of their objection they filed certain affidavits, and the plaintiff filed an affidavit in opposition thereto. The court overruled the objection, and directed the clerk to issue a venire for said jury. After said jury had been summoned, and before they were impaneled and sworn, the defendants filed their motion to quash the venire and their challenge to the array of said panel, supported by certain affidavits, and the plaintiff presented an affidavit in opposition thereto. The court overruled the motion and challenge. It is shown by the record that several days prior to the time the defendants demanded a struck jury, and during the November term of said court, the defendants' attorneys stated in open court that they would not try said cause by the regular jury then in attendance, but would demand a struck jury to try the cause, and that on the 20th of December, 1889, the judge of said court notified one of the defendants' attorneys that there was no cause to be tried by a jury at that term, unless they desired to so try this case, and was informed by said attorney that they did not desire to try it by the regular panel, but would demand a struck jury, and thereupon said regular jury was on said day discharged for the term. We think ⁵⁶¹ there was no error in these proceedings of which the appellants can complain. The statute must receive a reasonable construction, and when either party is present at the time and place fixed to strike the jury, and refuses to act, he is absent within the meaning of the statute, and the clerk should strike out names for him. It is true the machinery of the law is put in motion by the party making the demand for a struck jury, but when it is once set in motion, and the clerk is caused to act officially in the matter, it does not lie with the party invoking its aid to arrest the force so created. And when in this case the parties appeared in the clerk's office at the time fixed for striking the jury, and the clerk selected the names of forty persons from which the jury was to be struck, and gave to each of the parties a list of such names, the process of striking the jury had actually commenced; the clerk was in the performance of an official duty of a public

officer, and it was not then within the power of the defendants to stop or impede the proceeding by withdrawing their demand for a struck jury, or by remaining present, protesting and refusing to act. Some objections are made by the learned counsel for the appellants to a portion of the instructions given to the jury. The objections offered are quite numerous, but we think that when the instructions are considered together, as they should be, they fully and correctly state the law applicable to the case. The appellants also tendered certain instructions which were refused by the court, but every point in the case seems to be fully covered by the numerous and carefully framed instructions which the court gave the jury, and it was not necessary or proper to indulge in repetitions.

The judgment of the lower court ought to be, and it is affirmed.

CORPORATIONS.—LIABILITY FOR FRAUDULENT ISSUE OF STOCK: See the notes to *Allen v. South Boston R. R. Co.*, 15 Am. St. Rep. 192, and *Farrington v. South Boston R. R. Co.*, 15 Am. St. Rep. 226.

CORPORATIONS—LIABILITY FOR WRONGS OF AGENTS.—A corporation is liable for the torts of its agents within the apparent scope of their authority: *Jones v. Western Vermont R. R. Co.*, 27 Vt. 399; 65 Am. Dec. 206, and note; *Fishkill Sav. Inst. v. National Bank*, 80 N. Y. 162; 36 Am. Rep. 595; *Hussey v. Norfolk etc. R. R. Co.*, 98 N. C. 34; 2 Am. St. Rep. 312, and note.

LIMITATIONS OF ACTIONS—FRAUDULENT CONCEALMENT OF ACTION.—The statute of limitations does not begin to run against a plaintiff who has been kept in ignorance of his rights by fraudulent practices on the part of the defendant until the discovery of the fraud: *Lewey v. Fricke Coke Co.*, 168 Pa. St. 536; 45 Am. St. Rep. 684, and note, with the cases collected.

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CASES
IN THE
SUPREME JUDICIAL COURT
OF
MAINE.

POWERS v. TILLEY.

[87 MAINE, 84.]

TRESPASS—CHANGE IN FORM OF PROPERTY—MEASURE OF DAMAGES.—

The owner of trees cut from his land by a willful trespasser, and by him manufactured into railroad ties, and sold to an innocent purchaser, is entitled to recover from the latter the value of the property at the time of the purchase without any deduction for the increased value put upon it by the labor of the trespasser.

TRESPASS—CHANGE IN FORM OF PROPERTY—RIGHT TO RETAKE.—A trespasser cannot acquire any property in the chattels taken by expending labor upon them. They still remain the property of the original owner, who may retake them wherever he may find them, free from any claim by the trespasser for their increased value by reason of his labor.

F. A. and D. H. Powers, and L. C. Stearns, for the plaintiff.

C. P. Allen, for the defendant.

35 **STROUT, J.** Trover for a quantity of railroad sleepers. The cedar logs from which the sleepers were made had been cut on plaintiff's land by two trespassers, and by them manufactured into sleepers, and then sold to the defendant. The question is, What is the rule of damages? The presiding judge instructed the jury, that the plaintiff was entitled "to recover the value of the sleepers at the time of conversion [by defendant], whatever the sleepers were worth in the market to sell"; that, "at the instant Mr. Tilley [defendant] made that conversion, that instant he interfered with Mr. Powers' rights, and Mr. Powers [the plaintiff] is entitled to compensation measured by the value of the sleepers at that time. If Mr. York [the trespasser] had added to the value of those sleepers by his labor, that does not matter." To

this instruction defendant excepted. He now claims that plaintiff should recover only the value of the logs before manufacture into sleepers.

The logs being the property of the plaintiff when cut, the trespasser could not acquire any property therein by expending labor upon them. They still remained his property, and he could take them as such wherever he could find them, and the trespasser could have no claim against him for this increased value by reason of his labor thereon. When the defendant received the sleepers from the trespassers, and converted them to his own use, he took possession of plaintiff's property wrongfully. His conversion of the property could not antedate his purchase. That conversion was of the sleepers as they then were, not of the logs as when cut.

The rule of damages in trover is universal, that it is the value of the property at the time of the conversion. If the plaintiff had replevied the sleepers, it is difficult to perceive any defense that could have been made. Could the defendant have said that he had a special property in the sleepers to the extent of the value added to the logs by the original trespassers, and require plaintiff to pay that value before maintaining his suit? ³⁶ Clearly not. A rule that would relieve trespassers from all loss would tend to encourage wrongdoing.

It has sometimes been held that when the trespass was involuntary and not willful, the owner should recover his actual loss, and not the increased value added by the trespasser: *Beede v. Lamprey*, 64 N. H. 510; 10 Am. St. Rep. 426. The supreme court of the United States, however, lays down a different rule in *Wooden Ware Co. v. United States*, 106 U. S. 432. But when the trespass is willful, the courts adopting the mitigated rule of damages against involuntary trespassers allow the full value of the property in the condition in which it was at the time of the conversion. If defendant claimed that the trespass was not willful, it was for him to show it, before he could ask any mitigation of the ordinary rule of damages. We find no such evidence in the case.

In *Moody v. Whitney*, 38 Me. 174, 61 Am. Dec. 239, relied on by defendant, the court recognize and approve the rule, that in trover the damages are the value of the property at the time of conversion. But, in that case, the court said: "There is no evidence of a conversion by the defendants after

they began to take away the timber from the place where it originally stood." The conversion was at the time of cutting, and the damages were necessarily the value of the timber immediately after it was cut, and had become personal property. This included the cost of cutting, in addition to the stumpage. And in *Cushing v. Longfellow*, 26 Me. 306, which was an action of trespass de bonis, the cause of action accrued the moment the trees were severed from the land, and of course the damages were limited to their value at that time. But the court say the owners "might have seized them wherever they could find them; and might have demanded them, at another place, of one having them there, and, in an action of trover, have recovered the value of them there."

Upon principle and authority the instruction complained of was correct, and the entry must be, exceptions overruled.

TRESPASS—CHANGE IN FORM OF PROPERTY—DAMAGES—RECOVERY OF PROPERTY.—In an action of trespass for unlawful entry upon land and cutting and carrying away and converting timber growing thereon, the injured party is entitled to recover the value of the timber when it was first severed from the land, together with adequate damage for any injury done the land in removing it; and so long as the timber is not changed into a different species, as by sawing into boards, the owner of the land may regain possession of it by recapture or any remedy provided by law, although additional value may have been imparted to it by transportation to a better market: *Gaskins v. Davis*, 115 N. C. 85; 44 Am. St. Rep. 439, and extended note in which the subject is fully discussed.

STATE v. SWETT.

[87 MAINE, 99]

GAME LAWS—CARRIER'S LIABILITY.—A common carrier who knows that closed packages delivered to him for transportation contain lobsters, but does not know, nor have reason to believe, that they are of a kind which he is prohibited by law from having in his possession, does not, by retaining such possession for the purpose of transportation without examination, render himself liable for a penalty imposed by statute.

CARRIERS—DUTY TO EXAMINE GOODS.—A common carrier is not compelled to break open packages offered to him for transportation, in order to ascertain whether they contain goods which he is prohibited from having in his possession, nor can he be held liable for a failure to make such examination in the absence of circumstances arousing, or calculated to arouse, his suspicions.

F. W. Robinson, county attorney, for the state.

O. Hale, for the defendant.

109 PETERS, C. J. One of the proprietors of Swett's Express Company and a cartman in the employment of the company were tried on a criminal complaint against them for having in their possession nineteen hundred and twenty-four lobsters of less than ten and a half inches in length.

The complaint was brought upon section 2 of chapter 292 of the laws of 1889, which section reads as follows:

"It is unlawful to catch, buy, or sell, or expose for sale, or possess for any purposes, between the first day of July and the first day of the following May, any lobster less than ten and one-half inches in length, alive or dead, cooked or uncooked, measured in manner as follows: Taking the length of the back of the lobster, measured from the bone of the nose to the end of the ¹¹⁰ bone of the middle flipper of the tail, the length to be taken with the lobster extended on the back its natural length; and any lobsters shorter than the prescribed length when caught shall be liberated alive at the risk and cost of the parties taking them, under a penalty of one dollar for each lobster so caught, bought, sold, exposed for sale, or in possession, not so liberated."

There were twelve barrels of the lobsters packed in the customary manner for shipment to New York. There was evidence tending to show that the respondents knew that the barrels contained lobsters, but no evidence that they knew while the same were in their possession that they were short lobsters. The barrels had not been in their possession but a few moments before they were seized and carried away by a game and fish warden.

The counsel for the respondents asked for instructions appropriate to the positions of the defense which were refused by the learned judge, who gave in their stead the following rulings:

"If these respondents did not know that the barrels intrusted to them contained lobsters of some length, that is, if they were not aware that the barrels contained lobsters at all, even though they were constructively in their possession, then they cannot be found guilty. But while a common carrier is obliged to receive all goods offered him for transportation, he is not obliged to receive into his possession such goods as the law forbids him to receive into his possession. He is not obliged to receive short lobsters for transportation, because the law prohibits the possession of them for any purpose. But, gentlemen, I will go a little further, and I instruct you

that if a common carrier receives into his possession for transportation, or otherwise, lobsters, that is, if he receives barrels which he knows contain lobsters, then he is bound in law to know whether those lobsters are longer or shorter than ten and one-half inches, measured according to the statute; and if any such lobsters, as a matter of fact, are less than ten and one-half inches in length, then short lobsters are in his possession within the meaning of the law, and he would be guilty of violating this statute.

111 "Now you apply these principles of law to the testimony in this case, taking up each one of these respondents. If the respondent Swett knew when he sent his team to Commercial wharf that it was to receive twelve barrels of lobsters, and as matter of fact it did receive twelve barrels of lobsters, then he was bound to know whether those lobsters were shorter than prescribed by the statute which I have read; he is bound to know it in law, and if any of those lobsters were less than ten and one-half inches in length, measured according to the statute, they were in his possession, and you would be justified in finding a verdict against him. But if you have a reasonable doubt as to any of these facts, he is entitled to the benefit of it, and must be acquitted."

We are of the opinion that the law is not so exacting as these rulings would make it, and we feel clear that, if the respondents neither knew nor had good reason to believe that the barrels contained short lobsters, they should have been acquitted.

There are in our markets long as well as short lobsters—legal as well as illegal lobsters. And it must be presumed that the legal constitute the vast bulk of those that are the subject of traffic and transportation. Therefore, it may properly have been presumed by the respondents that the lobsters in question were of the length required by law, there being nothing indicating the contrary. The presumption is that the conduct of men will be in obedience to the requirements of the law when a violation of such law constitutes a criminal offense. Legal lobsters and illegal lobsters are two distinct and independent things.

What inconveniences and risks would men be subjected to who are only in an indirect way connected with commerce in lobsters, or commerce in other articles as well, if the rule given in this case in behalf of the government should prevail. All subordinates in railroad corporations and express

companies would be as much punishable for handling freight containing illegal lobsters as their principals would be, including such classes as agents, clerks, cartmen, porters, and employees of every grade and kind. There can be no distinction between ¹¹² the liabilities of the different classes of men engaged in exercising a control over the property. In fact, subordinates would be the persons usually to be caught in the net of the law. If a carrier who knows that packages delivered to him contain lobsters, not knowing whether they are long or short lobsters, transports them at his personal peril, his business will be profitless and hazardous as far as that kind of carriage is concerned. In such case the freight must be overhauled and examined, entailing a delay and consequently an injury to such perishable property. How long would it probably have taken the employees of this express company to measure these nineteen hundred and twenty-four lobsters, "by taking the length of the back of the lobster, measured from the bone of the nose to the end of the bone of the middle flipper of the tail, the length to be taken with the lobster extended on its back its natural length"?

How much more reasonable would it be to relieve carriers of such extreme impositions, as long as they are not conniving with law-breakers, and to leave the work of discovering such infractions of the laws to fish and game wardens and other official detectives. The judge in his charge in this case said: "It is true, as claimed by the attorney for the respondent, that if a package is offered to a carrier for transportation, he is not compelled by law to break open the package for the purpose of ascertaining whether or not it contains contraband goods. A law requiring such strictness of examination would be an interference with the rights of shippers that would not be tolerated." Why do not these remarks apply here exactly? Why is not this a case where the argument of intolerable inconvenience applies as forcibly as in any other? The aim of the law is to attain only reasonable and practical results in all matters where public interests are concerned. If the respondents did not know, or have reason to believe that the packages contained short lobsters, they were not under any obligation to explore and hunt as a detective would, to see if they might not perchance obtain such knowledge. Their possession was excusable, at least.

¹¹² An appeal in behalf of the government is made to the doctrine of the courts that for some statutory offenses a per-

son may be held even though he be ignorant of the facts which constituted his offense. That principle is applied only in minor offenses upon some ground of public policy for the protection of society against abuses which cannot be prevented under any more liberal rule. But public policy requires the application of no such rigorous rule here, where an express carrier and his cartman could each be punished, if punished at all, in the sum of nineteen hundred and twenty-four dollars, for having in possession for from five to fifteen minutes a property for the carriage of which the company would have received the sum of only six dollars. We do not think that the facts of the case present a very meritorious complaint against the respondents in any view of the law.

The authorities on this question are few, for the reason that hitherto extreme notions on the subject have not prevailed. The case of *Bennett v. American Express Co.*, 83 Me. 236, 23 Am. St. Rep. 774, is certainly in the direct line of the doctrine which we adopt in the present case. In the *Nitro-Glycerine Case*, 15 Wall. 524, it was held that no liability rests on a common carrier for injuries caused by dangerous explosives loaded on his ship, neither he nor his agent knowing or having reasonable cause to believe that the materials were hazardous merchandise. In the opinion the pending question is quite elaborately discussed on authority and principle. The doctrine of that case was followed in *State v. Goss*, 59 Vt. 266, 59 Am. Rep. 706, where the agent of an express company was complained of for selling intoxicating liquors, because he received packages of liquors and delivered them and received money therefor for the shipper, the sale taking place at the date of such delivery. The court decided that the respondent could not be held unless he knew or had good reason to believe that the packages delivered by him contained intoxicating liquors. And the court, in closing its discussion in that case, says: "If, then, in the absence of suspicious appearances and circumstances, an express carrier is neither bound to know nor authorized to find out, as a condition of receiving it,¹¹⁴ what a package contains that is offered him for carriage, it would be strange to hold him guilty of a criminal offense because of the character of its contents; for in such case he is bound to carry, and is liable if he does not; and the law will not compel a man to act, and then punish him for acting."

Exceptions sustained.

GAME LAWS—VIOLATION OF BY CARRIERS.—The legislature may enact a statute making it unlawful for any carrier to transport game killed in the state, knowing the same to have been sold, or knowing that it is to be sold or offered for sale; and any carrier transporting game in violation of such statute will be amenable to the penalty prescribed thereby: *American Express Co. v. People*, 133 Ill. 649; 23 Am. St. Rep. 641. A statute imposing a penalty upon any person killing, destroying, or having in his possession between the first days of October and January more than one moose, two caribou, or three deer, does not prohibit common carriers from having more than three deer in their possession between said days for the purpose of transportation: *Bennett v. American Express Co.*, 83 Me. 236; 23 Am. St. Rep. 774.

HALL v. GREEN.

[87 MAINE, 122.]

DIVORCE—DUTY OF FATHER TO SUPPORT CHILD AWARDED TO MOTHER.—

A decree of divorce granted to a wife, committing to her the care and custody of her minor child, entirely relieves the father from any legal obligation to support the child, except such as may be imposed upon him by the original or any subsequent decree in the divorce proceedings.

DIVORCE—DUTY OF FATHER TO SUPPORT CHILD.—A wife who is granted a divorce and the custody and care of her minor child cannot maintain an independent action against the father for the support of the child thereafter, if the decree of divorce is silent as to any allowance for the support of such child.

T. P. Pierce and H. E. Hall, for the plaintiff.

J. B. Peaks, for the defendant.

123 PETERS, C. J. The plaintiff is the husband of a former wife of the defendant, and has been supporting in his family a daughter of his wife by her former husband (the defendant), the wife having obtained a divorce from the latter for his fault. By the decree of divorce the custody of such minor child was committed to the mother. The plaintiff now claims to recover in this action for the child's support, for a period from 1884 to 1893, the sum of nearly thirteen hundred dollars. No express agreement is pretended, and only such an implied agreement as can legally result from the relations of the parties.

We are of the opinion that the action cannot be maintained. We think that when a divorce is granted to a wife, and as a consequence of it she has committed to her the care and custody of her minor child, it follows that the father becomes entirely absolved from the common-law obligation which previously rested upon him to support such child;

and that the only obligation of the kind afterward resting upon him consists in such terms and conditions, in respect to alimony and allowances, as ¹²⁴ the court may impose on him in the decree of divorce, or in some subsequent decree in the same proceeding.

Mr. Bishop, in his treatise on Marriage and Divorce, which contains a discussion of this question and of the authorities touching it, expresses our views in the following statement: "It seems to be a principle of the unwritten law that the right to the services of the children and the obligation to maintain them go together. The consequence of which would be, that, if the assignment of the custody to the mother goes to the extent of depriving the father of his title to the services of the children, he cannot be compelled to maintain them otherwise than in pursuance of some statutory regulation. When the court granting the divorce and assigning the custody to the wife makes, under the authority of the statute, provision for their support out of the husband's estate, he would seem, upon principles already mentioned, to be relieved from all further obligation": 2 Bishop on Marriage and Divorce, 6th ed., sec. 557.

And we have no doubt that the same exoneration from common-law liabilities and remedies follows when the court awards the custody of the child to the mother, but is silent in its decree on the question of allowances for the support of the children or for herself.

The implication of the decree in such case is that the wife voluntarily assumed the burden of supporting the children, or that there was some other special reason for the omission. It is well known that the record does not tell the whole story of many divorce cases. It is a common thing for parties to arrange matters of alimony and allowances among themselves before the cause is heard by the court. And the court permits such settlements: *Burnett v. Paine*, 62 Me. 122. And allowances to the wife for herself, and allowances to her for the support of her children, are usually included in one sum. And then the wife very often relinquishes all claim for either alimony or allowance for the support of her children, in order to remove opposition by her husband to her divorce.

We have very little doubt that there was something behind the record in the decree of divorce put in evidence here. The ¹²⁵ libel alleges instances of extreme cruelty, and prays for allowances for the wife and child. The defendant was

personally notified, but did not appear. And still, costs were not granted, nor any sums of any kind allowed. The inference is quite irresistible that the divorce was procured by some arrangement of the parties. And the inference is made stronger by the fact that the libel alleges that the respondent was possessed of real estate in Rockland and personal property in Boston.

Although a husband loses the services of his divorced wife and the earnings of their children, still he is not altogether relieved from the legal duty of assisting, according to circumstances, in the support of either the wife or children. The common-law obligation no longer exists, but a statutory obligation is substituted in its place. The burden of such support falls on the wife in the first instance. But the husband may be compelled at any time to assist her. There is nothing inconsistent in an application by her in subsequent proceedings in the original cause of the divorce for an allowance for the support of children, if she has not had any, or for an additional allowance if she has. The statute so declares, and the court has so held: *Harvey v. Lane*, 66 Me. 536.

In this way all the equities of the parties can best be considered and all their rights upheld. It would be unjust to allow both a common-law remedy and the statutory remedy to exist at the same time, and it would operate too severely on a husband for him to be constantly exposed to action by his divorced wife and also by strangers to recover of him sums expended by them for the support of his children, over whom he is not allowed to exercise any control. Especially would such a rule operate vexatiously when all such claims can be considered and adjusted on either legal or equitable grounds in one, and that an already existing proceeding.

We regard the case of *Gilley v. Gilley*, 79 Me. 292, 1 Am. St. Rep. 307, as virtually establishing the law of the present case. It was there held that a wife could maintain an action against a husband, from whom she had been divorced for his fault, for the expense of supporting their minor children in her possession, but only ¹³⁶ expressly so held because she did not have the legal custody of the children. And we consider that the doctrine adopted by us in this discussion is sustained by the weight of the adjudged cases generally, although there are some authorities of a very positive character the other way. We have no doubt, at any rate, that our own policy is the better one on the questions here presented.

There can be no more significant evidence of it than the fact that no such action as the present has ever, until now, been before the court in this state. The same question came before the Massachusetts court in the case of *Brow v. Brightman*, 136 Mass. 187, and was there determined adversely to the plaintiff.

Judgment for defendant.

DIVORCE—DECREE AWARDING CUSTODY OF CHILD TO MOTHER—LIABILITY OF FATHER FOR SUPPORT.—If a decree of divorce is granted either parent without provision for the custody of the children of the marriage, the parental relation between the parties and their children is not changed nor affected thereby, and the father remains liable for their support during their minority. This rule is based on the principle that he is entitled to the services and earnings, and liable for the support of his children during their minority, independent of any statute or decree of court: *Gilley v. Gilley*, 79 Me. 292; 1 Am. St. Rep. 307. When the decree divorcing the parties awards the custody of the children to the mother, but is silent as to any provision for their maintenance or support, a different and much more difficult question is presented to the court when it is asked to hold the father liable in a separate action for necessities furnished the children by the divorced wife or a third person. Upon this problem the courts of last resort are unable to agree, and are so evenly balanced on each side of the question that no positive rule can be deduced from the adjudged cases. One line of authorities stoutly maintains that a father is not liable in an action, separate from the divorce proceedings, for the support of his minor child, after its custody has been given to the mother by a decree of divorce. Another line of cases positively asserts that, if a decree of divorce awards the custody of the infant children of the marriage to the mother, either temporarily or permanently, without making any provision for their future support, the father is not thereby relieved of the legal obligation to provide for their maintenance during their minority, and if the mother or a third person thereafter maintains them, or makes reasonable and proper advances for their support, such mother or third person may maintain an action, independent of the divorce proceedings, and recover from the father for the necessities thus furnished them: *Pretzinger v. Pretzinger*, 45 Ohio St. 452; 4 Am. St. Rep. 542; *Courtright v. Courtright*, 40 Mich. 633; *Plaster v. Plaster*, 47 Ill. 290; *Holt v. Holt*, 42 Ark. 495; *Maddox v. Patterson*, 80 Ga. 719; *Thomas v. Thomas*, 41 Wis. 229; *Stanton v. Willson*, 3 Day, 37; 3 Am. Dec. 255; *Cowls v. Cowls*, 3 Gilin. 435; 44 Am. Dec. 708; *Buckminster v. Buckminster*, 38 Vt. 248; 88 Am. Dec. 652; *Conn v. Conn*, 57 Ind. 323; *Welch's Appeal*, 43 Conn. 342. A statute providing that, upon the dissolution of a marriage by divorce, the divorced parents of a minor child, in need of maintenance, shall maintain it according to their respective abilities, governed the ruling in this last case. In *Plaster v. Plaster*, 47 Ill. 290, the rule, as sustained by the authorities above cited, is stated to be that a decree dissolving the marriage relation and giving the custody of the children to the mother, and allowing a gross sum to her as alimony, does not impair the obligation of the father to support them, and he is thereafter bound to provide a reasonable and proper support for them during their minority, according to their age, ability, and circumstances, and his own means.

He is bound to provide necessaries only, including provision for their education, but he cannot be charged with their tuition when a free school is accessible to them. In estimating what is a reasonable and proper support for such children, their earnings should be considered, and deducted from the gross sum adjudged necessary, for the father is not bound to support them in idleness. The cases maintaining this doctrine apply the rule, no matter under what circumstances the custody of the children is awarded. The fact that the father is unfit to retain their custody does not constitute a controlling element. The rule and the reasons therefor were thus stated in *Pretzinger v. Pretzinger*, 45 Ohio St. 452; 4 Am. St. Rep. 542:

"The duty of the father to provide reasonably for the maintenance of his minor children, if he be of ability, is a principle of natural law; and he is under obligation to support them, not only by the laws of nature, but by the laws of the land. This natural duty is not to be evaded by the husband's so conducting himself as to render it necessary to dissolve the bonds of matrimony, and give to the mother the custody and care of the infant offspring. It is not the policy of the law to deprive children of their rights on account of the dissensions of their parents, to which they are not parties; or to enable the father to convert his own misconduct into a shield against parental liability. The divorce may deprive him of the custody and services of his children and of the rights of guardianship against his will; but if, by the judgment of the court, and upon competent and sufficient evidence, he is found to be an unfit person to exercise parental control, while the mother is in all respects the proper person to be clothed with such authority, he cannot justly complain. It is urged that the father is released from obligation to maintain his infant children, when deprived of their society and services against his will. But if voluntary misconduct on his own part leads to the deprivation, he is himself responsible, and not the court which intervenes for the protection of his children. And if the father, as against a stranger, cannot escape liability for necessaries furnished to his minor children, though remaining with their mother after the divorce, the mother will not be barred of an action against her former husband for the expense of maintaining the children. After a dissolution of the marriage relation by divorce, the parties are henceforth single persons, to all intents and purposes. All marital duties and obligations to each other are at an end, and they become as strangers to each other. Upon the establishment of such new relations, a promise may be implied on the part of the father to pay the mother, as well as a third person who has supplied the necessary wants of his infant child.

"It is contended that the defendant should have sought her remedy in the original divorce suit by a modification of the decree. It is doubtless recognized as the general doctrine that the court may, upon application made in the same cause, modify its decree as to alimony, from time to time, on any change in the condition of the parties, as justice may require. And such modification may be obtained by an original petition upon proper allegations: *Olney v. Watts*, 43 Ohio St. 499. But, as we have already seen, the expense of maintaining her minor child was not included in the judgment allowing alimony to the defendant in error.

"Owing, it may be, to the father's insolvency, the enforcement of his obligation to provide necessaries for his child was left to the future, as his indebtedness might be incurred by the furnishing of such necessaries by others, or as his pecuniary condition might improve. But while in the decree no order was made for the child's maintenance, the father could not avoid lia-

bility for his reasonable support because an action against him for necessities had been commenced in another tribunal, or because of his removal into another county. The natural obligation resting upon him in the forum of divorce would not become lifeless because its enforcement was not sought in the jurisdiction in which the divorce was granted": *Pretzinger v. Pretzinger*, 45 Ohio St. 452; 4 Am. St. Rep. 542.

On the other hand, an equally long and respectable line of authorities holds that the awarding to the mother of the custody of her minor child, without provision for its support, on decreeing her a divorce from the father, deprives him of all right to the services of the child, and consequently frees him from all liability to the mother or a third person furnishing necessities at her request, for the care, support, and maintenance of the child. Such mother or third person furnishing necessities to a child without a contract, express or implied, has no right to recover of the father by independent action. The remedy to secure such provision for the support of the child as the father may have the ability to furnish is under a decree as part of the divorce proceedings made at the time the original decree is rendered, or by subsequent supplemental decree rendered as a part of such proceedings: *Husband v. Husband*, 67 Ind. 583; 33 Am. Rep. 107; *Brow v. Brightman*, 136 Mass. 187; *Fitter v. Fitter*, 33 Pa. St. 50; *Finch v. Finch*, 22 Conn. 411, overruling *Stanton v. Willson*, 3 Day, 37; 3 Am. Dec. 255; *Hancock v. Merrick*, 10 Cush. 41; *Ramsey v. Ramsey*, 121 Ind. 215; *Johnson v. Onsted*, 74 Mich. 437; *Johnson v. Johnson*, 36 Ill. App. 152; *Burritt v. Burritt*, 29 Barb. 124; *Reid v. Reid*, 74 Iowa, 681; *Chandler v. Dye*, 37 Kan. 765. In *Brow v. Brightman*, 136 Mass. 187-189, the supreme judicial court said: "By the decree of this court upon the libel for divorce, the care and custody of his child were taken from the defendant and given to the wife. With this decree in force he had no right either to take the child and support it himself, or to employ any one else to support it, without the mother's consent. The wife had no authority to bind the defendant by a contract for the support of the child, and no contract can be implied upon which the plaintiff can recover in this action. The remedy to secure such provision for the support of the child as the defendant might have the ability to furnish, was under a decree of this court which it had ample authority to make in the proceedings before it either as a part of the original decree or at any subsequent time." In *Husband v. Husband*, 67 Ind. 583-585, 33 Am. Rep. 107, the court used this language: "The action for divorce was one in which the plaintiff might, if her case warranted it, and should have obtained a provision for the support of the child; but, having taken her decree for divorce and the custody of the child without any provision for its support, she took upon herself the burden of its support without such provision, and cannot now maintain an action for such support. She is estopped by the record to claim now what she should have secured, if entitled to it, in the action for divorce." Again, in *Johnson v. Johnson*, 36 Ill. App. 152-155, the court said that, "the wife, by asking and assuming the care and custody of the child, assumed the duty and obligation of its support. By accepting the provisions made for her by the decree, that amount included all she was entitled to from her husband. She having asked for and received the care and custody of the child, she is bound for its support."

The award of the care and custody of the child to the mother is presumed to carry with it the obligation to support, or at least to relieve the father from the obligation to furnish such support upon the call of the mother: *Burritt v. Burritt*, 29 Barb. 124. One case goes so far as to hold that after a

decree of divorce, either with or without an order for the custody of the children, there is no implied obligation on the part of the father to pay for support voluntarily furnished by the mother to the children, while she asserts and maintains the right to their custody, society, and services, unless the father has in some way manifested his purpose to abandon them, or has refused to take them into his custody and properly support them: *Ramsey v. Ramsey*, 121 Ind. 215. This case, however, so far as it relieves the father from any liability for the further support of his child, not assigned to the custody of any one in the divorce proceedings, is believed to be contrary to principle and the weight of authority as shown by the principal case.

If a divorced woman to whom the care, management, and maintenance of her child is decreed, without any provision for its support, remarries, and her second husband takes the child to his home and cares for it with knowledge of the provisions of the decree, without demanding pay of the father, who resides in the vicinity, for the keeping of the child, and without any agreement regarding its support, the father is not liable therefor, nor can the divorced wife make any contract with her second husband which binds the father for the support of the child without his consent: *Johnson v. Onsted*, 74 Mich. 437.

By virtue of statutory provisions in most of the states the court is authorized, on granting a divorce, to determine who shall have the custody of the children, and if it awards them to the mother, also to award an allowance from the father to her for their support, and to change it from time to time. Hence, the court may make provision for the support of the children of the marriage out of the property of the father as a part of the original decree of divorce awarding their custody to the mother, and may change it from time to time upon a showing of changed conditions of the parties or their children, or if the decree which grants the custody of the minor children to the mother is silent as to any provision for their support, the mother may by subsequent motion in the same proceedings obtain an order of court compelling the father to provide her with means with which to support his children of that marriage upon showing his ability to do so: *Wilson v. Wilson*, 45 Cal. 399; *Call v. Call*, 65 Me. 407; *Harvey v. Lane*, 66 Me. 536; *Cox v. Cox*, 25 Ind. 303; *Husband v. Husband*, 67 Ind. 583; 33 Am. Rep. 107; *Brow v. Brightman*, 136 Mass. 187; *King v. Miller*, 10 Wash. 274; *Erkenbrach v. Erkenbrach*, 96 N. Y. 456; *Chester v. Chester*, 17 Mo. App. 657. It has been held that the court may, upon the petition of the divorced wife, make an order of allowance out of the father for the past as well as the future support of their child awarded to the mother by the original decree; nor is the power of the court to order an allowance for the future support of the child affected by a stipulation of the parties, made at the time that the divorce is granted, that a certain sum received by the mother from the father shall be in full for her allowance for the support of the child: *Wilson v. Wilson*, 45 Cal. 399. The power of the court to make an order for an allowance for the past support of the child was denied in *Chester v. Chester*, 17 Mo. App. 657. It has also been maintained that a decree of divorce awarding the custody of a minor child to the mother, and a certain sum to her as alimony, is conclusive so long as the situation of the parties remains unchanged, and the mother cannot maintain a supplemental proceeding to recover an additional sum for the support of the child without alleging and showing such change in the circumstances of the parties as would make an additional order expedient: *Reid v. Reid*, 74 Iowa, 681.

BRIGGS v. HUNTON.

[87 MAINE, 145.]

CONTRACTS—WARRANTY OF FITNESS.—There is no implied warranty in a contract for the service of a stallion for breeding that the animal is free from disease that may be transmitted to offspring.

POLICE POWER.—The use of private property for a private purpose, not deleterious to public health or welfare, so as to come within proper police regulation, may be enjoyed free from legislative control.

SALES.—THE PRICE OF SERVICE OF A STALLION for breeding purposes may be recovered if the animal has not been advertised or held out for public use, although he has not been registered as required by statute.

G. C. Wing, for the plaintiffs.

A. R. Savage and H. W. Oakes, for the defendant.

148 HASKELL, J. Two questions are presented:

1. Does a contract for the service of a stallion for breeding contain an implied warranty that the animal is free from disease that may be transmitted to offspring? The element of deceit that might result from the concealment of disease known to the owner of the animal must be eliminated from the consideration of this question, as that element might be cause for a remedy differing from that sought here. It does not pertain to this case.

149 In the sale of chattels by the manufacturer, for specific uses, an implied warranty arises that the article is fit for the use intended: *Downing v. Dearborn*, 77 Me. 457.

In the sale of chattels, without express warranty of quality and without fraud, *caveat emptor* applies, and no warranty is implied by law: *Kingsbury v. Taylor*, 29 Me. 508; 50 Am. Dec. 607; *Winsor v. Lombard*, 18 Pick. 57; *Mixer v. Coburn*, 11 Met. 559; 45 Am. Dec. 230; *French v. Vining*, 102 Mass. 132; 3 Am. Rep. 440; *Howard v. Emerson*, 110 Mass. 320; 14 Am. Rep. 608. If, however, the sale be by description, without opportunity for inspection, the article must not only meet the description, but be salable or marketable, of the kind described. Said Lord Ellenborough: "The purchaser cannot be supposed to buy goods to lay them on the dunghill": *Gardiner v. Gray*, 4 Camp. 144; *Warner v. Arctic Ice Co.*, 74 Me. 475.

In the sale of provisions other than to the consumer, it seems settled that the rule of *caveat emptor* applies: *Howard v. Emerson*, 110 Mass. 320; 14 Am. Rep. 608; *Giroux v. Stedman*, 145 Mass. 439; 1 Am. St. Rep. 472; *Moses v. Mead*, 1 Denio, 878; 43 Am. Dec. 676; *Humphreys v. Comline*, 8 Blackf.

516; *Ryder v. Neitge*, 21 Minn. 70. But some authorities except sales of provisions to the consumer for domestic use from the rule: *Van Bracklin v. Fonda*, 12 Johns. 468; 7 Am. Dec. 339; *Hoover v. Peters*, 18 Mich. 51; *Sinclair v. Hathaway*, 57 Mich. 60; 58 Am. Rep. 327; *Copas v. Anglo-American Provision Co.*, 73 Mich. 541. Other cases are sometimes cited to the same point, but in these the defect was known, as it was in the leading case, *Van Bracklin v. Fonda*, 12 Johns. 468; 7 Am. Dec. 339.

In the case at bar, the owner sold the services of his stallion for breeding purposes. Had he known the stallion to have been diseased, and concealed the fact, it would have been fraud. Not knowing this, upon what ground, or from what principle of law, can warranty be implied? Why not apply the rule of *caveat emptor*? The purchaser had the same field of inquiry open to him as the seller.

In *Kingsbury v. Taylor*, 29 Me. 508, 50 Am. Dec. 607, winter rye was innocently sold for seed spring-rye, whereby the purchaser lost his crop, and the court held no deceit, and in effect say there was no warranty implied.

¹⁵⁰ In *Winsor v. Lombard*, 18 Pick. 57, mackerel were sold as No. 1 and No. 2; held, no warranty that they were not No. 3 in quality. In *Howard v. Emerson*, 110 Mass. 320, 14 Am. Rep. 608, a cow was sold by a farmer to retail butchers, and it was held that there was no implied warranty that she was fit for food. In *Giroux v. Stedman*, 145 Mass. 439, 1 Am. St. Rep. 472, a farmer killed a hog and sold the flesh, knowing that the purchaser intended to eat it, and the court said there was no warranty that it was fit for food.

If a warranty is to be implied in the case at bar, it must arise from the principle of sale for specific use. There was no sale of a chattel, but the sale of the use of a chattel. No authority has been cited that any implied warranty arises from the contract of letting that the thing let is fit for the use intended where the selection is made by the lessee.

In *Deming v. Foster*, 42 N. H. 165, a particular yoke of oxen were sold to work on a farm, and the court held there was no implied warranty of their fitness. The court illustrates by quoting from *Keates v. Cadogan*, 10 Com. B. 591, 2 Eng. L. & Eq. 320, and shows the difference between: "Sell me a horse fit to carry me," and "Sell me that gray horse to ride." In the case at bar, the plaintiff did not sell the service of a stallion fit to beget offspring; but the service of "Sir William."

He knew no reason why he was not fit for the purpose, and the law does not imply a warranty that he was.

2. Can the price of service for a stallion be recovered when the animal has not been registered, as required by the Revised Statutes, chapter 38, section 61? That statute provides: "The owner or keeper of any stallion for breeding purposes, before advertising, by written or printed notices, the service thereof, shall file a certificate [describing the animal]. Whoever neglects to make and file such certificate shall recover no compensation for said services," and is subjected to the penalty for knowingly filing a false one.

The statute manifestly applies to animals kept for public use, because being applied to the use of the public, it is proper enough to require a truthful description and pedigree to be ¹⁵¹ stated on a public record. The use being dedicated to the public, the public may by law regulate it so far as necessary for their protection: *State v. Edwards*, 86 Me. 102; 41 Am. St. Rep. 528. But where the use of property is private, and not deleterious to public health or welfare, so as to come within proper police regulation, the use may be enjoyed free from legislative control.

In this case, the owner of the stallion had not advertised him, had not held him out for public use, and therefore might enjoy the fruits of his service in such a way as he might choose to do. He might breed his own mares to him. He might breed his neighbors' mares to him, or to the mares of a stranger, without violating any law. Contracts for such service would be valid and binding upon the makers of them.

Exceptions overruled.

SALES—ANIMALS — IMPLIED WARRANTY OF FITNESS.—The law implies no warranty in the sale of a Durham cow that she will prove suitable for breeding purposes, although the price paid for her indicates that it was for that purpose that she was bought: *Scott v. Renick*, 1 B. Mon. 63; 35 Am. Dec. 177, and note. If on the sale of a bull both parties are ignorant as to whether he is able to generate his kind, and there is no fraud and no express warranty, no warranty is implied in that respect merely because a full price is paid for the animal for breeding purposes, and the seller knows that he is being purchased for that purpose: *McQuaid v. Ross*, 85 Wis. 492; 39 Am. St. Rep. 864, and note, in which similar cases are collected. See, also, the notes to *Fairbank Canning Co. v. Metzger*, 16 Am. St. Rep. 758; *Emerson v. Brigham*, 6 Am. Dec. 117, and *Boyd v. Wilson*, 24 Am. Rep. 181, where the subject of implied warranties of fitness in general are discussed.

POLICE POWER—REGULATION OF THE USE OF PRIVATE PROPERTY.—The owner of property cannot be prohibited by a legislative body from conducting

a lawful business thereon unless such business is of such an offensive character that the health, safety, or comfort of the surrounding community requires its exclusion from that particular locality: *Ex parte Whitwell*, 98 Cal. 73; 35 Am. St. Rep. 152, and note. See the notes to *City of Richmond v. Dudley*, 28 Am. St. Rep. 184, and *Ex parte Sing Lee*, 96 Cal. 354; 31 Am. St. Rep. 218.

HILL v. CROCKER.

[87 MAINE, 208.]

SHIPPING—ADVANCEMENTS BY PART OWNER FOR REPAIRS—CONTRIBUTION.

A managing part owner of a vessel has authority to advance money for necessary repairs to the ship in a foreign port, and may compel contribution from the other part owners.

CONTRIBUTION—NONSUIT AT LAW AS DEFENSE.—A part owner of a ship who is liable to contribution to another part owner who has paid a note given by all the part owners cannot resist recovery on the ground that he has obtained a nonsuit in an action brought against him by the holder of the note.

T. W. Vose, for the plaintiff.

P. H. Gillin, for the defendant.

209 EMERY, J. The brig *James Miller*, of Bangor, in September, 1887, was in the port of Key West, Florida, in distress, and needing repairs to continue her voyage. The master sent notice of the circumstances to Charles R. Hill, the complainant, who was part owner and agent for all the owners of the brig. The master also requested that the sum of two thousand five hundred dollars be sent him to enable him to make the necessary repairs. Mr. Hill thereupon called together such owners as were within call to make provision for the repairs. Several of the owners met and arranged that the necessary money should be raised by a note. Mr. Hill, therefore, prepared a note payable to his own order, to be indorsed by him and discounted at the bank. This note was signed by the owners present, and the names of the absent owners were affixed by Mr. Hill, assuming to act as their agent. 210 The note was renewed in the same way three times, and was finally paid with interest, each of the owners contributing his share, except the respondent, Freeman Littlefield, who has paid nothing. The proceeds of the note were sent to the master, and applied to the repairs of the brig.

Mr. Littlefield was notified of the proposed meeting and of its purpose. He said he might not be able to attend, but if he did not he would be satisfied with whatever the meeting

should resolve to do. He did not attend the meeting. Several other owners, who were absent at sea, were not notified of the meeting, but have since paid their share of the money.

This bill in equity is now brought to compel Mr. Littlefield to contribute his share, which is agreed to be one hundred and ninety-six dollars, June 1, 1894, if he is bound to make contribution.

It is a general and necessary rule in maritime law that the managing owner, or ship's husband, has authority to bind all the owners for necessary repairs to the ship in a foreign port. Without such a rule foreign commerce by sea could not be carried on: *Benson v. Thompson*, 27 Me. 474; 46 Am. Dec. 617; *Hardy v. Sproule*, 29 Me. 258; *Chapman v. Durant*, 10 Mass. 51. It follows that if such owner advances his money for such purpose he may have contribution from the other owners: *Benson v. Thompson*, 27 Me. 470; 46 Am. Dec. 617. In this case the recusant owner, Littlefield, was aware of the necessity of the repairs and of the proposed meeting of the owners to devise ways and means. He practically promised to acquiesce in the action of the meeting and contribute his share of the sum that should be raised for the repairs. It is equitable that he should contribute.

He claims, however, that it has already been adjudicated that he is not liable to contribute. The holder of the note brought an action on the note against Littlefield as a signer. It was ruled by the presiding justice that no evidence was then before the court that Littlefield had signed the note or authorized any one to sign for him. The plaintiff in that action thereupon became nonsuit. That judgment, however, is no bar to this equity suit. The parties are not the same. The cause of action is not the ²¹¹ same. It has never been adjudicated that Littlefield should not contribute his share of the money advanced for these repairs.

There should be a decree against Littlefield for the sum of one hundred and ninety-six dollars, with interest from June 1, 1894, and costs, and a further decree for the distribution of the proceeds among the other owners.

Case remanded for decrees in accordance with this opinion.

SHIPPING—ADVANCEMENT BY PART OWNER FOR REPAIRS—LIABILITY OF CO-OWNERS.—Each part-owner of a vessel is in general liable *in solido* for the cost of repairs to the vessel made in good faith: *Elder v. Larrabee*, 45 Me. 590; 71 Am. Dec. 567, and note. One co-owner of a vessel cannot maintain

an action at law against the other owners jointly to recover for contributions for advances; the joint remedy exists in equity: *Arey v. Hall*, 81 Me. 17; 10 Am. St. Rep. 232. This question is fully discussed in the extended note to *Donnell v. Walsh*, 83 Am. Dec. 366.

BRYANT'S POND STEAM MILL COMPANY v. FELT.

[87 MAINE, 284.]

CORPORATIONS—WITHDRAWAL OF STOCK SUBSCRIPTIONS.—Subscriptions to the capital stock of a business corporation do not become binding upon the subscribers until the corporation has been organized and the subscriptions accepted. Until then the subscribers have a right to withdraw and revoke their subscriptions.

J. P. Swasey, for the plaintiff.

J. S. Wright, for the defendant.

²³⁷ WALTON, J. The only question we find it necessary to consider is whether a subscriber to the capital stock of an unorganized corporation has a right to withdraw from the enterprise, provided he exercises the right before the corporation is organized and his subscription is accepted. We think he has. Such a subscription is not a completed contract. It takes two ²³⁸ parties to make a contract. A non-existing corporation can no more make a contract for the sale of its stock than an unbegotten child can make a contract for the purchase of it.

The right of subscribers to the capital stock of a proposed corporation to withdraw their subscriptions at any time before the organization of the corporation is completed has been affirmed in several recent and well-considered opinions. The right rests upon the impregnable ground of the legal impossibility of completing a contract between two parties, only one of which is in existence. There can be no meeting of the minds of the parties. There can be no acceptance of the subscriber's proposition to become a stockholder. There can be no mutuality of rights or obligations. There can be no consideration for the subscriber's promise. As said in one of our own decisions, it is a mere *nudum pactum*—a promise without a promisee, a contractor without a contractee. In fact, every element of a binding contract is wanting. If the subscriber's promise to take and pay for shares remains unrevoked till the organization of the proposed corporation is

effected, and his promise has been accepted, then we have all the elements of a valid contract—competent parties; mutuality of duties and obligations; a valid consideration, the promise of one party being a sufficient consideration for the promise of the other; a promisee as well as a promisor; a contractee as well as a contractor. In fact, all the elements of a valid contract are present, and the subscription has become binding upon both of the parties. But, till the corporation has come into existence, all these elements are necessarily wanting, and the subscriber's promise amounts to no more than an offer, which, like all mere offers, may be withdrawn at any time before acceptance. When accepted it becomes binding. Till accepted it remains revocable. This conclusion is sustained by reason and authority.

In *Starrett v. Rockland etc. Ins. Co.*, 65 Me. 374, the plaintiff sought to recover a portion of the dividends of a successful insurance company. He had subscribed for five shares of the stock before the organization of the company was effected; but the evidence of acceptance of his subscription by the corporation after its organization was not satisfactory; and the court held ²³⁹ that without such acceptance there was no completed or binding contract; that the minds of the parties never met; that the plaintiff's subscription, being made before the corporation came into existence, amounted to no more than a proposal to take so many shares—a mere *nudum pactum*—imposing no obligations and securing no rights.

And in *Carr v. Bartlett*, 72 Me. 120, the right of subscribers to withdraw from such undertakings while they remain inchoate and incomplete is recognized and affirmed.

In *Muncy Traction Engine Co. v. Green*, 143 Pa. St. 269, decided in 1888, the defendant had been active in procuring subscribers to the capital stock of a proposed corporation, and had himself subscribed for twenty shares; but he wrote to the chairman of the meeting for the organization of the corporation that, for reasons satisfactory to himself, he withdrew his subscription. The court ruled that the defendant had a right to withdraw his subscription at any time before the organization of the corporation was completed; and the jury having found as a matter of fact that the withdrawal was before the organization of the corporation was completed, a verdict for the defendant was affirmed, and judgment rendered thereon.

In *Hudson Real Estate Co. v. Tower*, 156 Mass. 82, 32 Am. St. Rep. 484 (1892), the action was founded on a subscription to the capital stock of an unorganized corporation, and the defense was based on an alleged withdrawal of the subscription. The right to withdraw was controverted. The court held that at the time when the defendant signed the subscription paper declared on, it was not a contract, for want of a contracting party on the other side; that while such a subscription may become a contract after the corporation has been organized, still, until the organization is effected, and the subscription is accepted, it is a mere proposition or offer, which may be withdrawn, like any other unaccepted proposition or offer.

It is urged by the counsel for the plaintiff corporation that such subscriptions create binding and enforceable contracts between the subscribers themselves, and are therefore irrevocable, ²⁴⁰ except with the consent of all the subscribers; and some of the authorities cited by him seem to sustain that view. But we find, on examination, that such views, when expressed, are in most cases mere dicta, and that the cases are very few in which such a doctrine has been acted upon. Reason and the weight of authority are opposed to such a view. Of course, subscription papers may be so worded as to create binding contracts between the subscribers themselves. But we are not now speaking of such subscriptions; or of voluntary and gratuitous subscriptions to public or charitable objects, which, when accepted and acted upon, become binding. We are now speaking only of subscriptions to the capital stock of proposed business corporations. With regard to such subscriptions, we regard it as settled law that they do not become binding upon the subscribers till the corporations have been organized and the subscriptions accepted; and that, till then, the subscribers have a right to revoke their subscriptions. And, in view of the fact that such subscriptions are often obtained by overpersuasion, and upon sudden and hasty impulses, we are not prepared to say that the rule of law which allows such a revocation is not founded in wisdom. We think it is.

In the present case, an old man, upwards of eighty years of age, and now dead, was induced to subscribe for twenty shares of stock in a proposed, but not then organized, manufacturing corporation; but after a little reflection, he determined to revoke his subscription and withdraw from the enterprise.

He notified the agent of the promoters, through whom his subscription had been obtained, of his determination to withdraw, and requested him to take his name off the subscription paper. And he again sent word by his son to have his name taken off. And notice of his withdrawal, and of his request to have his name taken off of the subscription paper, was given to the other subscribers at one of their meetings, and before the corporation was organized. We think his withdrawal was legal and complete, and that no action to recover the amount of his subscription is maintainable.

Other grounds are urged in defense of the action, but it is unnecessary to consider them.

Judgment for defendant.

CORPORATIONS—WITHDRAWAL OF STOCK SUBSCRIPTIONS.—A subscription to the stock of a proposed corporation may be withdrawn, though other subscribers have acted on the strength of the subscription, if the corporation has not been formed: *Hudson Real Estate Co. v. Tower*, 161 Mass. 10; 42 Am. St. Rep. 379, and note, with the cases collected. See an extended discussion of the subject in the note to *Parker v. Thomas*, 81 Am. Dec. 392.

CLEVELAND v. CITY OF BANGOR.

[87 MAINE, 259.]

JUDGMENT AGAINST COTRESPASSERS.—An unsatisfied judgment against one tort-feasor upon which execution has issued is no bar to a suit against another.

JUDGMENT AGAINST COTORT-FEASORS.—An unsatisfied judgment against a street railway for injury received by reason of an obstruction in a street is no bar to an action against the city for the same cause of action.

MUNICIPAL CORPORATIONS—LIABILITY FOR DEFECT IN STREET.—To render a city liable for personal injuries caused by an obstruction in the street, it must appear that such obstruction was the sole cause of the injury.

SUNDAY LAWS.—WALKING OR RIDING IN THE OPEN AIR, in a quiet and civil manner, with no object of business or pleasure, except the enjoyment of air and exercise for the promotion of health, is not a violation of a Sunday law.

MUNICIPAL CORPORATIONS—DEFECTS IN STREET—NEGLIGENCE—PROXIMATE CAUSE.—Contributory negligence to bar recovery against a city for an injury received from a defective highway must be one of the efficient and proximate causes of the accident, and not a mere condition or occasion of it.

MUNICIPAL CORPORATIONS—DEFECTS IN STREETS—PROXIMATE CAUSE OF ACCIDENT.—Whether the fright of a horse at an electric car is to be deemed the proximate cause of an accident arising from an obstruction in the street, or only a circumstance which permitted it to happen, must depend upon the character and conduct of the horse. If he was

not reasonably gentle and safe, and became entirely unmanageable from fright, thus causing the accident, the fright of the horse is the proximate cause of the accident, and the city is not liable therefor. If the horse was reasonably safe and suitable, and, while being properly driven, started and shied at the sudden appearance of the car, swerving but a few feet from the line of travel, and through only a momentary loss of control by the driver brought the vehicle in contact with the obstruction in the street, such obstruction, and not the horse, was the proximate cause of the accident, and the city is liable.

C. P. Stetson and P. H. Gillin, for the plaintiff.

H. I. Mitchell, city solicitor, for the defendant.

261 WHITEHOUSE, J. The plaintiff recovered a verdict for eleven hundred dollars against the city of Bangor for personal injuries received on Exchange street, by reason of an obstruction which she claimed rendered the way defective and unsafe for public travel. The defect alleged was one of the poles erected and maintained by the Bangor Street Railway for the support of the trolley wire used in the operation of that company's road.

The pole in question was located on the westerly side of Exchange street, twenty-seven feet northerly from the extension of Washington street. It was set in the street with its outer face eighteen inches and its inner face nine inches from the curbstone of the sidewalk, the pole being nine inches in diameter at its base. At the time of the accident it "leaned over considerably" into the street. Exchange street is forty-six feet wide between the curbstones, and the distance from the curb near the location of the pole to the westerly rail of the track is twenty-one feet.

On Sunday, September 18, 1892, the plaintiff with her husband and two others was riding on Exchange street in a two-seated covered carriage drawn by one horse, the team being in the control of her husband as driver. As they drew near Washington street the horse became frightened at the appearance of one of the electric cars approaching around the corner, and suddenly shied to the right, and at the same time sprang forward and brought the carriage in contact with the pole in question, throwing the plaintiff out and causing the injury of which she complains.

The case comes to this court on exceptions and a motion to set aside the verdict as against evidence.

1. The exceptions.

Prior to the commencement of this action against the city

of Bangor, the plaintiff had brought suit against the Bangor Street Railway for the same injuries described in the declaration in this case, and recovered judgment for the sum of nine hundred and fourteen dollars and fifty-seven cents, on which execution was duly issued; but there has been no satisfaction ²⁶² of that judgment for want of property belonging to that company which the plaintiff could make available for the purpose.

That judgment was duly pleaded by the defendant's counsel in defense of this action; but the presiding judge ruled that the mere recovery of judgment against the street railway without satisfaction was no bar to a suit against the city. An exception was taken to this ruling, and it appears in the printed case duly allowed by the presiding justice; but it is evidently not relied upon, as no allusion whatever is made to it in the elaborate argument submitted by the learned counsel for the defense.

The instruction upon this point was undoubtedly correct. As every wrongdoer is responsible for his own act, it is a general rule that when two or more participate in the commission of a wrong, the injured party may proceed against them either jointly or severally; and if severally, whether the separate actions are brought at the same time or successively, each may be prosecuted to final judgment. But the sufferer is obviously entitled to only one full indemnity for the same injury. If, however, the several judgments differ in amount, he may elect to take his satisfaction *de melioribus damnis*; or, if the defendants are not all solvent, he may elect to proceed against the solvent party. But with respect to several judgments recovered at the same time, no such choice "of the better damages" or larger judgment, and no such election to proceed against a party supposed to be solvent, unless followed by actual satisfaction, will prevent the plaintiff from enforcing a judgment against another defendant; nor will an unsuccessful attempt to enforce a judgment against one wrongdoer be a bar to a subsequent action against another who is liable for the same wrong. And it is entirely immaterial whether execution was issued on the prior judgment or not. An unsatisfied judgment against one tort-feasor is no bar to a suit against a joint tort-feasor. It is not the formal adjudication of a right or the legal precept for its enforcement, but the substantial fact of compensation or its equivalent, which constitutes the bar.

This doctrine not only rests upon principles of sound reason and manifest justice, but is supported by an overwhelming ²⁶³ weight of authority. It prevails in a great majority of the American states, and has received the unqualified approval of the supreme court of the United States. In *Lovejoy v. Murray*, 3 Wall. 1, it was held that judgment in a former suit, with part payment, constituted no bar to the action against the defendant. In the opinion by Miller, J., it is said: "But in all such cases what has the defendant in such second suit done to discharge himself from the obligations which the law imposes upon him to make compensation? His liability must remain in morals and on principle until he does this. The judgment against his cotrespanders does not affect him so as to release him on any equitable consideration. . . . But when the plaintiff has accepted satisfaction in full for the injury done him, from whatever source it may come, he is so far affected in equity and good conscience, that the law will not permit him to recover again for the same damages. But it is not easy to see how he is so affected until he has received full satisfaction, or what the law must consider as such.

"We are therefore of the opinion that nothing short of satisfaction or its equivalent can make good a plea of former judgment in trespass, offered as a bar in an action against another joint trespasser, who was not party to the first judgment." In *Sheldon v. Kibbe*, 3 Conn. 214, 8 Am. Dec. 176, there had been judgment against a cotrespasser who was committed to jail by force of an execution which issued thereon, but the court held these facts to be no bar to the suit against the defendant. In the opinion, Hosmer, C. J., says: "The common law, founded as it is upon reason, and allowing nothing that is nugatory, much less that is pernicious, will sanction no inutility or absurdity. Now, what can be more absurd than to authorize the pendency and proceeding of twenty separate actions against persons concerned in a joint trespass, and, after the accumulation of vast expense, to hold that the first judgment bars the other suits": See, also, *Ayer v. Ashmead*, 31 Conn. 447; 83 Am. Dec. 154; *Osterhout v. Roberts*, 8 Cow. 43; *Elliott v. Hayden*, 104 Mass. 180; *Knight v. Nelson*, 117 Mass. 458; *Savage v. Stevens*, 128 Mass. 254; *Sanderson v. Caldwell*, 2 Aik. 195; *Elliot v. Porter*, ²⁶⁴ 5 Dana, 299; 30 Am. Dec. 689; *United Society etc. v. Underwood*, 11 Bush, 265; 21 Am. Rep. 214; *Wyman v. Bowman*, 71 Me. 128; Bigelow

on Estoppel, 57, 128; Cooley on Torts, 2d ed., 158. In Freeman on Judgments, section 236, the author says: "A few cases decide that the mere issuing of an execution is a conclusive election to consider the defendant as exclusively responsible. But a majority of the American cases discountenances this manifest absurdity. . . . How vain and delusive that law must be which declares the right of an injured party to proceed severally against every person concerned in committing an injury; which sustains him until the liability of every wrongdoer is severally determined and evidenced by a final judgment; and which, after thus 'holding the word of promise to his ear, breaks it to his hope,' by forbidding him to attempt the execution of either judgment, upon penalty of releasing all the others."

White v. Philbrick, 5 Me. 147, 17 Am. Dec. 214, is one of the "few cases" that may be cited in support of the doctrine thus characterized by Mr. Freeman as a "manifest absurdity." It appears to have been decided on the authority of the early case of *Brown v. Wootton*, Yel. 67, and a qualified dictum in *Livingstone v. Bishop*, 1 Johns. 290, 3 Am. Dec. 330; but it stands upon indefensible ground. As stated by the court in *Murray v. Lovejoy*, 2 Cliff. 191, "it does not seem to rest upon any substantial basis," and should no longer be followed. In the later case of *Hopkins v. Hersey*, 20 Me. 449, it is held that a collateral concurrent remedy against one not a joint trespasser is not barred by anything short of actual satisfaction, and the case of *White v. Philbrick*, 5 Me. 147, 17 Am. Dec. 214, is distinguished as a "decision limited to cotrespassers." This technical refinement was obviously suggested to prevent a conflict, and avoid the necessity of overruling *White v. Philbrick*, 5 Me. 147; 17 Am. Dec. 214. But with regard to the point under consideration, no sound reason has been given, and it is believed that none can be assigned, for such a distinction between the case of wrongdoers who are jointly and severally liable and of those who are only severally liable for the same injury. In either case the sufferer is entitled to but one compensation for the same injury, and full ²⁶⁵ satisfaction from one will operate as a discharge of the others. In neither case will anything short of satisfaction from one bar a suit against another. A master, for instance, is liable for the tort of his servant, and a satisfaction from one will discharge both, but they cannot be sued and declared against jointly. So in *Brown v. Cambridge*, 3

Allen, 474, the plaintiff brought suit against the water company for an injury sustained on account of a trench left in the highway, and, by way of compromise, accepted a small sum in "payment and satisfaction" of all damages in that suit. It was held that he was thereby precluded from maintaining a subsequent action against the city for the same injury. Conversely, in *Bennett v. Fifield*, 13 R. I. 139, 43 Am. Rep. 17, it was held that judgment with execution against an individual for leaving in the highway an object calculated to frighten horses was no bar to a subsequent suit against the town for permitting it to remain, although the defendant in the former suit had been committed to jail on the execution, and the claim subsequently proved against his estate in bankruptcy. But as Rhode Island was one of the three states in which the error of *Brown v. Wootton*, Yel. 67, had been followed (see *Hunt v. Bates*, 7 R. I. 217; 82 Am. Dec. 592), the court limited the latter case to joint wrongdoers, and distinguished it from *Bennett v. Fifield*, 13 R. I. 139, 43 Am. Rep. 17, on the ground that the individual and the town in the latter case could not be regarded as joint tort-feasors. "They were not jointly, but collaterally liable for the same injury," said the court, "by reason of distinct though related torts, and therefore the injured parties until indemnified are entitled to look to either of them remaining undischarged for their damages."

In the case at bar, the liability of the street railway for negligence respecting the location of its posts existed at common law, while the liability of the city for permitting the obstruction to remain is created by general statute: Rev. Stats., c. 18, sec. 80. And, although the liability of both is reaffirmed in section 8, chapter 378, of the laws of 1885, for obvious reasons they cannot be deemed joint tort-feasors with respect to the mode of redress. But it is immaterial. Concurrent remedies exist against them severally for ²⁶⁶ the same cause. The plaintiff is entitled to indemnity for the injury, but only one indemnity. Satisfaction from the railway company would have been a bar to this suit; but judgment and execution against the company without satisfaction cannot be a bar. Having a judgment against each, she will be entitled to choose the larger sum and the solvent party.

2. The motion.

In the report of the plaintiff's case against the street railway (*Cleveland v. Bangor Street Ry. Co.*, 86 Me. 232), the

court say respecting the motion for a new trial: "A careful examination of the evidence reported satisfies us that it was sufficient to authorize the verdict." A careful review of the evidence reported in this case against the city leads us to the same conclusion. True, the ground of liability is essentially different. In the action against the railway the defendant would not have been exempt from liability for the consequences of its own negligence if some other cause for which the plaintiff was not responsible had contributed to the accident: *Lake v. Milliken*, 62 Me. 240; 16 Am. Rep. 456. But in this action against the city it must appear that the defect in the street was the sole cause of the injury. If any other cause for which the plaintiff was responsible, or any other independent cause for which neither the plaintiff nor the city was responsible, proximately contributed to the injury, she cannot recover.

But unlawful traveling on Sunday would bar recovery in either case, and the defendant contends that the verdict was not authorized by the evidence on this point. We are unable to concur in this view. It involves an interpretation of the statute at variance with its true spirit and purpose. It is not every act of walking or riding on Sunday that constitutes "traveling" within the meaning of the Revised Statutes, chapter 124, section 20. It is only unnecessary traveling which is prohibited. Works of necessity and charity are expressly excepted from the prohibition; and "a moral fitness of propriety of traveling under the circumstances of any particular case may be deemed necessary within this section": Parsons, C. J., in *Commonwealth v. Knox*, 6 Mass. 76; *Sullivan v. Maine Cent. R. R. Co.*, 82 Me. 196. The primary object of such legislation has been to secure to private ²⁶⁷ citizens the quiet enjoyment of Sunday as a day of rest, and to encourage the observance of moral duties on that day, but not to authorize any arbitrary or vexatious interference with the private habits and comfort of individuals: *Hamilton v. Boston*, 14 Allen, 475. In accordance with these views was the decision of the court in *McClary v. Lowell*, 44 Vt. 117, 8 Am. Rep. 366, holding that it was not unlawful for a father to ride eight miles on Sunday to visit his minor sons and attend to their welfare in another town. And it has been repeatedly held in this state and Massachusetts that walking or riding in the open air in a quiet and civil manner, with no object of business or pleasure except the enjoyment of the air and gentle exercise and

the consequent promotion of the health, is not in violation of the Sunday law: *O'Connell v. Lewiston*, 65 Me. 84; 20 Am. Rep. 673; *Davidson v. Portland*, 69 Me. 116; 31 Am. Rep. 253; *Sullivan v. Maine Cent. R. R. Co.*, 82 Me. 196; *Barker v. Worcester*, 139 Mass. 74.

In the case at bar, the plaintiff was in feeble health, and, being unable to walk with comfort, had accepted her husband's invitation to ride into the country for the enjoyment of the open air and the benefit of her health. The fact that the companionship of her husband and friends may have enhanced the pleasure of the drive did not render it unlawful. The jury found in favor of the plaintiff under proper instructions, and we see no justification for disturbing the verdict on this ground.

But the defendant finally contends that the uncontrollable conduct of the horse, and not the obstruction in the street, was the proximate cause, or one of the proximate causes, of the accident.

The law of causal connection in this class of cases has been maturely considered and critically analyzed in the recent decisions of this court: *Spaulding v. Winslow*, 74 Me. 528; *Aldrich v. Gorham*, 77 Me. 287; *Perkins v. Fayette*, 68 Me. 152; 28 Am. Rep. 84; *Moulton v. Sanford*, 51 Me. 127. These authorities all agree that the contributory fault which will bar a recovery against a town for a defective highway must be one of the efficient and proximate causes of the accident, and not a mere condition or occasion of it. But it has been found ²⁶⁸ impracticable to prescribe by abstract definition, applicable to all possible states of facts, what is a proximate and what a remote cause; what is a true and efficient cause of a given result, and what is a mere "occasion" or "opportunity" for the operation of the true cause. "Everything which induces or influences an accident does not necessarily and legally cause it. It might be the agency, or medium, or opportunity, or occasion, or situation, or condition, as it is variously styled, through or by which the accident happened, but no part of its real and controlling cause. . . . Much must depend upon the circumstances of each particular case, and upon the common sense of the thing": *Spaulding v. Winslow*, 74 Me. 528.

Whether the fright of the horse at the electric car shall be deemed the true and real cause of the accident, or only a circumstance which permitted it to happen, must depend upon

the character of the horse and the extent of his misconduct. If the horse was not reasonably gentle and safe, and became entirely unmanageable from fright, substantially freeing himself from the control of the driver, and the accident resulted from such a want of control, then the fright of the horse might be regarded as one of the proximate causes of the accident. If, however, the horse was ordinarily safe and reasonably suitable for use on the public street, and, while being properly driven, started and shied at the sudden appearance of the electric car around the curve, swerving but a few feet from the line of travel, and, through only a momentary loss of control by the driver, brought the carriage in contact with the pole in the street, in such case the conduct of the horse could not, in reason and justice, be considered as causing the accident: *Spaulding v. Winslow*, 74 Me. 528; *Aldrich v. Gorham*, 77 Me. 287.

This test of a town's liability in such a case has also been applied in Massachusetts. In *Titus v. Northbridge*, 97 Mass. 258, 93 Am. Dec. 91, it is said: "The court are of opinion that when a horse, by reason of fright, disease, or viciousness, becomes actually uncontrollable so that his driver cannot stop him, or direct his course, or exercise or regain control over his movements, and in this condition comes upon a defect in the highway by which ²⁶⁹ an injury is occasioned, the town is not liable for the injury, unless it appears that it would have occurred if the horse had not been so uncontrollable. But a horse is not to be considered uncontrollable that merely shies or starts or is momentarily not controlled by the driver." As stated by Peters, C. J., in *Spaulding v. Winslow*, 74 Me. 528: "It is not a fault in a horse to be spirited, or to start up quickly, or to shy and shear from objects to a certain extent. Such things are very common occurrences, and cannot be prevented or effectually guarded against by the owners or drivers of horses. It is not unreasonable to drive horses of such description upon our public roads. Therefore, it would not be reasonable to say that the fright of the horse, under such circumstances was a proximate cause of the plaintiff's injury."

This doctrine is not in conflict with the rule applied in *Moulton v. Sanford*, 51 Me. 127, and *Perkins v. Fayette*, 68 Me. 152; 28 Am. Rep. 84. In each of those cases it was evidently found that the horse had passed entirely beyond the

control of the driver, and that his misconduct was one of the proximate causes of the accident.

In the case at bar, whether the pole in the street constituted a defect, and whether the misconduct of the horse was one of the proximate causes of the accident, were questions submitted to the jury with appropriate instructions to which no exceptions were taken. They found in favor of the plaintiff, and we are unable to say that the contrary inference is the only reasonable inference. The horse had been driven by the plaintiff's husband prior to that time, and he had been considered gentle and safe. The motorman on the car says the horse was "scared of the car the same as other horses are." The horse was within ten or fifteen feet of the pole when he took fright at the car, and shied a few feet to the right. The driver was holding the reins with both hands, and only momentarily lost control of the horse. In all probability he would have regained control of him, and avoided an accident, if the pole had not obstructed the traveled way. Under these circumstances it is not unreasonable to say that the fright of the horse was not the real cause of the accident. On the other hand, it might reasonably have been ²⁷⁰ anticipated that such a contingency would arise, and that a pole thus located in the street would be a source of danger to public travel, and cause an accident either in the precise manner in which it did cause it or in some similar way.

Motion and exceptions overruled.

JUDGMENTS AGAINST JOINT TORT-FEASORS.—A judgment against one of several wrongdoers unsatisfied is not a bar to the maintenance of an action against the others: *Russell v. McCall*, 141 N. Y. 437; 38 Am. St. Rep. 807, and note, with the cases collected.

SUNDAY LAWS—WALKING IN STREETS—DEFECTS THEREIN.—A person who walked about a mile in a town on Sunday is not a traveler in such a sense as to bar his recovery against the town for injuries suffered during such walk from a defect in the highway: *O'Connell v. City of Lewiston*, 65 Me. 34; 20 Am. Rep. 673. One walking on the Lord's day for exercise is not barred of his right to recover for an injury caused by a defective highway because previous to such injury he entered a beer-shop and drank a glass of beer: *Davidson v. Portland*, 69 Me. 116; 31 Am. Rep. 253. A person injured while traveling on the Lord's day by a defect in the highway must prove that he was traveling from necessity or for purposes of charity: *Bosworth v. Swansea*, 10 Met. 363; 43 Am. Dec. 441, and note; *Cratty v. Bangor*, 57 Me. 423; 2 Am. Rep. 56; *Johnson v. Town of Irasburgh*, 47 Vt. 28; 19 Am. Rep. 111. *Contra*, *Platz v. City of Cohoes*, 89 N. Y. 219; 42 Am. Rep. 286. This question is further discussed in the notes to *Abbott v. Abbott*, 24 Am. Rep. 26, and *Coleman v. Henderson*, 12 Am. Dec. 294.

MUNICIPAL CORPORATIONS—DEFECTS IN HIGHWAY—LIABILITY.—A defect in a highway for which a town is liable must be such that it is the sole cause of the injury complained of: *Pratt v. Inhabitants*, 147 Mass. 245; 9 Am. St. Rep. 691, and note; *Schaeffer v. Jackson Tp.*, 150 Pa. St. 145; 30 Am. St. Rep. 792, and note, with the cases collected. See, also, the note to *Raymond v. City of Lowell*, 53 Am. Dec. 67.

MUNICIPAL CORPORATIONS—LIABILITY FOR OBSTRUCTIONS IN HIGHWAY FRIGHTENING HORSES.—Where the proximate cause of an injury on a highway is the fright of a horse, and that fright is not caused by any defect in the highway, nor by any neglect of duty on the part of the township officers, the township is not liable, although the injury is caused by the horse running into a defect in the highway: *Schaeffer v. Jackson Tp.*, 150 Pa. St. 145; 30 Am. St. Rep. 792, and note. See *Loberg v. Town of Amherst*, 87 Wis. 634; 41 Am. St. Rep. 69, and note, and the extended note to *Morse v. Town of Richmond*, 98 Am. Dec. 606.

MAILHOIT v. METROPOLITAN LIFE INSURANCE CO.

[87 MAINE, 374.]

INSURANCE—RECOVERY OF PREMIUMS.—The liability of an insurance company for a return of premiums is not absolute, but depends upon whether the policy has become a binding contract between the parties. If it has, and the risk has commenced, there can be no apportionment, and no action lies for the recovery of the premiums paid.

LIFE INSURANCE.—FRAUDULENT ACTS OF AN INSURANCE AGENT in sending an application and certificate of medical examination fraudulent in whole or in part to his company, upon which it acts in issuing a policy, is a fraud upon the company alone, and the insured cannot complain after the company has treated the policy as a binding contract.

LIFE INSURANCE—WAIVER OF CONDITIONS.—An application for life insurance and medical examination are preliminaries solely for the benefit and protection of the insurer in issuing the policy. He may entirely dispense with or waive them, and issue a policy which is valid and binding.

LIFE INSURANCE—FRAUD IN EFFECTING—RECOVERY OF PREMIUMS.—A policy of life insurance regular in every respect, except that through the fraud of the insurance agent there has been no medical examination of the insured, and the application has not been signed by him, although it purports to have been, and the whole transaction has taken place without his knowledge or consent, is voidable at the election of the insurer, but not absolutely void, and the insured cannot recover premiums paid thereon if the insurer has treated the policy as a valid subsisting contract.

LIFE INSURANCE—FRAUD IN PROCURING—RECOVERY OF PREMIUMS.—An insured person induced by false representations material to him to take out a policy upon his life may elect to rescind and avoid the policy, and is then entitled to recover the premiums paid, but if such false representations are not material to him, and are a fraud upon the insurer alone, he is not entitled to recover.

T. M. Drew and L. G. Roberts, for the plaintiff.

J. H. Drummond and J. H. Drummond, Jr., for the defendant.

377 FOSTER, J. The plaintiff seeks to recover the amount paid in premiums on a policy of insurance on the life of his wife.

The case comes before this court upon an agreed statement, and the facts briefly stated are these: On September 6, 1890, plaintiff was induced by defendant's agent to take a policy of insurance on the life of his wife in the defendant company, payable at her death to himself, upon the representations that the wife need not sign any application therefor or know or consent to the same; that she need not be examined by a physician of the company, and that the company permitted applications to be made in such way, and issued policies thereon.

Upon these representations the plaintiff consented to take a policy in the defendant company on the life of his wife without her knowledge or consent. Thereupon the defendant's agent filled out the application and affixed her signature to the same. The plaintiff then paid the agent the advance premium of thirty-one cents. The wife was not examined by a physician of the company, although what purports to be a certificate of medical examination of the wife, signed by a physician of the company, **378** is attached to the application, the alleged certificate having been filled out and signed by the defendant's physician without any examination or the knowledge or consent of the wife.

September 15, 1890, on this application and examination the company issued its policy for five hundred dollars on the life of the wife, payable to the plaintiff at her death. The wife had no knowledge that an application for insurance on her life had been made until about four weeks afterward, all the negotiations having been carried on with the plaintiff by defendant's agent. Neither he nor his wife are able to read or write in the English language, and all negotiations were carried on in the French language.

Pursuant to the conditions of the policy, plaintiff continued to pay the weekly premiums of the thirty-one cents thereon (amounting in all to thirty-six dollars and twenty-seven cents), until November 21, 1892, when he refused to make further payments of premiums, and demanded of the agent

of the company a return of the premiums paid by him, upon the ground that the representations of the agent at the time the plaintiff agreed to take the policy were false; that he was induced to take the policy by these representations, and that he had learned that by the rules and regulations of the company the policy was void.

Upon the foregoing facts the plaintiff claims that the policy was void, and that he is entitled to recover in this action the amount paid in premiums on the policy. The liability of an insurance company for a return of premiums is by no means absolute, but depends upon the question whether the policy has ever become a binding contract between the parties. If it has, and the risk has once commenced, then there can be no apportionment, nor will an action lie for the recovery of the premiums paid. This principle is thus laid down by the text-writers: "Where the contract has once taken effect there is ordinarily no rule of law to sustain the recovery back of premiums paid, even though the insurer attempted to declare a forfeiture. On the other hand, where the contract has never taken effect, the premiums may ³⁷⁹ be recovered back, in accordance with the general rules governing the recovery back of money paid": Cook on Life Insurance, 193, 194; Bliss on Life Insurance, sec. 423; *Leonard v. Washburne*, 100 Mass. 251.

Applying these principles to the case at bar, we must ascertain whether this policy had ever become effectual as a contract and the risk had ever commenced. If so this action cannot be maintained.

The application was in the usual form, regular upon its face, and came into the defendant's possession through the regular channels and in the usual course of its business. The fraud relied upon by the plaintiff was the fraud of the defendant's agent, and the company, relying upon what purported to be the application of plaintiff's wife for a policy upon her life for the benefit of her husband, issued its policy in accordance with the proposals contained in that application. The plaintiff received a policy which insured the life of his wife for his benefit in the exact terms and under the precise conditions which he applied for, provided the policy was valid and binding upon the company. He makes no complaint that this is not true. But the gist of his complaint is that his policy is not binding upon the company, but is void because of the acts of its agent.

But the fraud which was committed was not a fraud upon the plaintiff. He was in nowise injured or damaged by it. It was a fraud upon the defendant, and nobody but the defendant could be injured or damaged by it.

The fraudulent acts consisted in sending an application and certificate of medical examination, fraudulent in whole or in part, to the defendant, upon which it would act in issuing its policy. The application and medical examination were solely for the purpose of giving the defendant an opportunity to decide whether to issue its policy on the life of the plaintiff's wife or not. All the provisions of the application, policy, and rules of the company which were violated by the defendant's agent and physician were provisions for the sole benefit of the defendant. They were not for the benefit of the plaintiff or his wife. The purpose of these provisions was to satisfy the defendant that it ³⁸⁰ was safe in issuing the policy. They furnished the information upon which the defendant acted in issuing the policy, and, so far as the plaintiff was concerned, it mattered not to him whether there was an actual application and medical examination or not, so long as the policy issued was, in its terms and conditions, such as he wanted. There is no pretense that it was not. He complains concerning the fraud committed upon the defendant. If that fraud did not render the policy absolutely void, then he has no cause for complaint. If the risk commenced to run, the policy was not void.

The application and medical examination, being preliminaries for the protection of the defendant in issuing its policy, and solely for its benefit and advantage, could have been entirely dispensed with if the defendant had seen fit so to do. The defendant could have waived them entirely and issued a policy which would have been valid and binding upon it: *North Berwick Co. v. New England etc. Ins. Co.*, 52 Me. 336, 341; *Allen v. Vermont Mut. Fire Ins. Co.*, 12 Vt. 366.

This case does not present to the court the question of fraud upon the insured or a fraud in relation to provisions of the policy that were for his benefit, and of which he could take advantage; but the sole question is, whether the fraud upon the defendant committed by its own agents rendered the policy absolutely void, so that no risk was ever assumed under it.

The application in form was regular in every respect, and, so far as the plaintiff was concerned, it stated the exact terms

and conditions of the insurance he desired. There is no pretense that the plaintiff's wife was not a proper subject of insurance, nor that, so far as her health was concerned, she was not a good risk, nor that the answers and statements in the application and certificate of medical examination were false and not true in fact.

The insurance was regular in every respect, with the exception that there had been no medical examination of the life proposed for insurance, and the application was not signed by her, although it purported to be, and the whole transaction took place without her knowledge and consent.

²⁸¹ The effect of these acts might render the policy voidable so far as the defendant was concerned, but would not make it absolutely void. The courts in different jurisdictions have held that policies issued under circumstances similar to these shown to have existed in this case are either valid, or voidable only, but never absolutely void: Bliss on Life Insurance, secs. 82, 83, 294.

In Massachusetts, the court in recent decisions has held the policy voidable: *Leonard v. Washburn*, 100 Mass. 251; *Plympton v. Dunn*, 148 Mass. 523. The supreme court of the United States holds such acts to be the acts of the company and bind it: *Insurance Co. v. Wilkinson*, 13 Wall. 222; *Insurance Co. v. Mahone*, 21 Wall. 152; *New Jersey etc. Ins. Co. v. Baker*, 94 U. S. 610. In New York, the policy is held to be binding upon the company: *Baker v. Home Life Ins. Co.*, 64 N. Y. 648; *Miller v. Phoenix etc. Life Ins. Co.*, 107 N. Y. 292; *O'Brien v. Home Benefit Soc.*, 117 N. Y. 310. In Connecticut, the policy is held to be voidable: *Ryan v. World Mut. Ins. Co.*, 41 Conn. 168; 19 Am. Rep. 490. In Ohio, the policy is held to be valid: *Massachusetts Life Ins. Co. v. Eshelman*, 30 Ohio St. 647. In Iowa, the policy is held valid: *McArthur v. Home Life Assn.*, 73 Iowa, 336; 5 Am. St. Rep. 684. In this case the agent inserted, without the knowledge of the assured, false answers in the application, and forged the certificate of medical examination. In Michigan, the policy is held to be valid and binding on the company: *Brown v. Metropolitan Life Ins. Co.*, 65 Mich. 306; 8 Am. St. Rep. 894; *Temminck v. Metropolitan Life Ins. Co.*, 72 Mich. 388. So in Colorado: *State Ins. Co. v. Taylor*, 14 Col. 499; 20 Am. St. Rep. 281.

While in different jurisdictions there is a contrariety of opinion as to the effect of the acts of an agent which are a fraud upon the company, they are held either to have estopped the com-

pany from taking advantage of them, or to have rendered the policy voidable only. While the courts in some of the cases have spoken of the policies as "void," it will be found upon examination that the word was used in the sense of voidable only,²⁸² as the questions of waiver or affirmance of such acts were discussed: *Atlantic Ins. Co. v. Goodall*, 35 N. H. 328, 332. In that case the court say: "But the term 'void' is equivocal. It may import absolutely null, or merely voidable, as it is often used where the contract to which it applies has a capacity to be affirmed, and thus rendered effectual from the first, the affirmance operating as a waiver of the right to avoid."

In some of the cases the courts have intimated that the premiums might be recovered, but it was upon the ground that the policy was voidable, and that the company had avoided it, thus rendering itself liable to an action for the premiums. It was so held in *Insurance Co. v. Pyle*, 44 Ohio St. 19; 58 Am. Rep. 781, and in *New York Life Ins. Co. v. Fletcher*, 117 U. S. 519. But that question does not arise in this case. It is not claimed that this policy was voidable on account of the fraudulent acts of the agent, and had been avoided, either before or since the commencement of this suit, by the defendant upon that ground. The facts stated show that the defendant has always treated this policy as a valid policy, and that it was in fact in force at the time this suit was brought. It was lapsed by the defendant only after the refusal of the plaintiff to pay the premiums in accordance with its terms and conditions, and in fact not till after this suit was commenced. The defendant has never attempted to take advantage of the fraud, but, on the contrary, has recognized and treated the policy as a valid and existing contract up to and even after suit was brought by the plaintiff to recover the premiums.

Whatever the effect of such fraudulent acts of the agent, as shown in this case, might have upon the policy in other jurisdictions, there can be no doubt that since the act of 1870, chapter 156 (incorporated into and a part of the Revised Statutes, chapter 49, section 90), in this state it must be held to be a binding and subsisting contract. That statute provides that "such agents and the agents of all domestic companies shall be regarded as in the place of the company in all respects regarding any insurance effected by them. The company is bound by their knowledge of the risk and of all matters connected therewith. Omissions and misdescriptions²⁸³ known to the agent shall be regarded as

known by the company and waived by it as if noted in the policy."

In *Farrow v. Cochran*, 72 Me. 309, the action was for the recovery of premiums paid on a life insurance policy, on the ground that the policy was void, because the agent without authority changed the terms of the policy. The policy did not conform to the application and the desires of the insured in reference to the beneficiary. The agent changed its terms so as to conform to his wishes without the knowledge and consent of the company, and the court held that his act was the act of the company, and that the policy was binding upon it.

Notwithstanding the rules and regulations of the company provide that any policy issued upon the life of a wife for the benefit of her husband without her knowledge and consent and examination by the company's physician, and, unless she personally signs the application, is null and void, and this is held to be a part of the contract and binding upon the company, it does not render the contract void *ab initio*, but only voidable: *Bliss on Life Insurance*, sec. 260; *Atlantic Ins. Co. v. Goodall*, 35 N. H. 328, 332. In this latter case the question turned upon the expression "null and void" in the policy, and the court held that it meant voidable only, and that the policy was capable of confirmation.

These rules and regulations were inserted for the benefit of the defendant, and it had the right to waive them and affirm the policy if it saw fit so to do: *Atlantic Ins. Co. v. Goodall*, 35 N. H. 328; *Pierce v. Nashua Fire Ins. Co.* 50 N. H. 297; 9 Am. Rep. 235; *North Berwick Co. v. New England etc. Ins. Co.*, 52 Me. 336, 341; *Day v. Dwelling-House Ins. Co.*, 81 Me. 244.

It is undoubtedly true that if a person is induced by false representations to take out a policy of insurance, he can avoid it and recover the premiums paid upon it. But the representations must be material as to him, such as work an injury to him. In the present case the representations were of facts that were of interest to the defendant alone, and their truth or falsity could be of moment and importance to the defendant only. Assuming they were the inducement upon which the plaintiff relied in entering into the contract, they did not render the ³⁸⁴ contract absolutely void, but only voidable: *United States etc. Ins. Co. v. Wright*, 83 Ohio St. 533.

In the last-cited case the agent of the insurance company made false representations to the insured as to the payment of premiums and as to the terms of the policy by which he was induced to take out the policy and pay the premiums. Upon learning the falsity of the representations, he repudiated the contract and commenced suit for the return of the premiums. It was held that he could not recover upon the ground that the contract was absolutely void, but upon the ground that he could rescind: *Pennsylvania etc. Ins. Co. v. Crane*, 134 Mass. 56; 45 Am. Rep. 282; *Hedden v. Griffin*, 136 Mass. 229; 49 Am. Rep. 25. The right of recovery in these cases is based upon the ground that the contract is voidable by the insured, and that he has properly rescinded it. In the present case there has been no rescission, nor facts showing that it was unnecessary by reason of the policy being worthless: *Farrow v. Cochran*, 72 Me. 309; *Cutler v. Gilbreth*, 53 Me. 176. In any view that can be taken of this case, the policy was not void absolutely.

Nor can the plaintiff recover upon the ground that the policy was voidable and has been rescinded. The defendant has never attempted to take advantage of the fraud to annul the contract. If the defendant had avoided the contract upon this ground instead of treating it as a subsisting contract, it might be that the plaintiff could properly treat the contract as rescinded, and be entitled to a return of the premiums paid upon it. The courts have so held, but no court has held that the premiums could be recovered in a voidable policy simply because it was voidable. This policy at the time the plaintiff attempted to rescind was not void *ab initio*; at most it was only voidable, and the risk under it had been assumed by the defendant. It had commenced to run. The life of the plaintiff's wife was insured from the delivery of the policy till it lapsed by reason of nonpayment of the premiums, and was in force at the time this suit was instituted, and if it had become due it cannot be ³⁸⁵ said in law that it would not have been paid: *Plympton v. Dunn*, 148 Mass. 523, 527.

It will be noticed that the class of cases cited by the learned counsel for the plaintiff are those where there were misrepresentations made by the insured in obtaining the policy, or a breach of warranty on his part.

In those cases the courts have held that the misrepresentations, whether intentional or otherwise, and the breach of

warranties, have rendered the policies void, so that there could be no recovery upon them. In the case at bar the fraud was that of the agent of the defendant, but the defendant has treated the policy as a valid, subsisting contract, and never sought to annul it on the ground of fraud. The plaintiff has never rescinded it, even if it were in his power so to do. The result is that the action cannot be maintained.

Judgment for defendant. —

INSURANCE—RECOVERY OF PREMIUM.—An innocent breach of warranty in an application for an insurance policy renders the policy void from the beginning, but the premiums may be recovered: *Insurance Co. v. Pyle*, 44 Ohio St. 19; 58 Am. Rep. 781.

INSURANCE—LIFE—FRAUDULENT ACTS OF AGENT.—The fraud of a life insurance agent binds the company, and he acts within the scope of his authority where, having been duly authorized as agent to fill up an application, he fraudulently and falsely mistates material facts therein and in the medical certificate, of which facts neither the assured nor the company had any knowledge: *McArthur v. Home Life Assn.*, 73 Iowa 336; 5 Am. St. Rep. 684, and note. If answers are written in an application for insurance by an agent of the insurer without the knowledge or consent of the applicant, the company is precluded from any defense based on the falsity of such answers: *Brown v. Metropolitan etc. Ins. Co.*, 65 Mich. 306; 8 Am. St. Rep. 894, and note. See, also, the note to *State Ins. Co. v. Taylor*, 20 Am. St. Rep. 289, and especially the extended note to *Manhattan etc. Ins. Co. v. Weill*, 26 Am. Rep. 370.

SICKRA v. SMALL.

[87 MAINE, 493.]

LIBEL—EVIDENCE IN MITIGATION OF DAMAGES.—In actions of libel or slander the defendant may introduce evidence in mitigation of damages that plaintiff's general reputation as a man of moral worth is bad, and may also show that his general reputation is bad with respect to that feature of character covered by the defamation in question.

LIBEL.—DAMAGES in actions of libel or slander are measured by the injury caused by the words published and not by the moral culpability of the writer or speaker.

LIBEL.—EVIDENCE OF GENERAL REPORT that plaintiff is guilty of the imputed offense, or of defendant's suspicions of his guilt, is not admissible in actions of libel or slander for the purpose of reducing damages.

G. F. Haley, for the plaintiff.

E. J. Cram, for the defendants.

494 **WHITEHOUSE, J.** This was an action of libel for defamatory matter published in a newspaper representing that the plaintiff and Mrs. Blake had "eloped" and were living together in adultery.

At the trial evidence was offered by the defendant and admitted by the court subject to the plaintiff's right of exception that the plaintiff's "general character" was bad in the community in which he lived.

1. It was not questioned by the plaintiff that, in actions for libel or slander, the character of the plaintiff may be in issue upon the question of damages; but it is contended that the inquiry should be restricted to the plaintiff's general reputation in respect to that trait of character involved in the defamatory charge.

While there has been some contrariety of opinion, or at least of expression upon this question, it must now be regarded as settled, both upon principle and the great weight of authority, that, in this class of cases, the defendant may introduce evidence in mitigation of damages that the plaintiff's general reputation as a man of moral worth is bad, and may also show that his general reputation is bad with respect to that feature of character covered by the defamation in question; and, as to the admission of such evidence, it is immaterial whether the defendant has simply pleaded the general issue or has pleaded a justification as well as the general issue: *Stone v. Varney*, 7 Met. 86; 39 Am. Dec. 762; *Leonard v. Allen*, 11 Cush. 241; *Bodwell v. Swan*, 3 Pick. 376; *Clark v. Brown*, 116 Mass. 505; *Root v. King*, 7 Cow. 613; *Lamos v. Snell*, 6 N. H. 413; 25 Am. Dec. 468; *Bridgman v. Hopkins*, 34 Vt. 533; *Eastland v. Caldwell*, 2 Bibb, 21; 495 4 Am. Dec. 668; *Powers v. Cary*, 64 Me. 1; Odgers on Libel and Slander, 304; Sutherland on Damages, 679; Best on Evidence, 256; 1 Wharton on Evidence, 53; 2 Starkie on Slander, 87; 1 Greenleaf on Evidence, sec. 55; 2 Greenleaf on Evidence, sec. 275.

In *Stone v. Varney*, 7 Met. 86, 39 Am. Dec. 762, the libel imputed to the plaintiff "heartless cruelty toward his child," and it was held competent for the defendant to introduce evidence in mitigation of damages that "the general reputation of the plaintiff in the community as a man of moral worth" was bad. After a careful examination of the authorities touching the question, the court say in the opinion: "This review of the adjudicated cases, and particularly the decisions in this commonwealth, and in the state of New York, seems necessarily to lead to the conclusion that evidence of general bad character is admissible in mitigation of damages. . . . It cannot be just that a man of infamous character should,

for the same libelous matter, be entitled to equal damages with the man of unblemished reputation; yet such must be the result unless character be a proper subject of evidence before a jury. Lord Ellenborough, in 1 Maule & S. 286, says: 'Certainly a person of disparaged fame is not entitled to the same measure of damages with one whose character is unblemished, and it is competent to show that by evidence.' "

In *Leonard v. Allen*, 11 Cush. 241, the plaintiff was charged with maliciously burning a schoolhouse, and it was held that, in the introduction of evidence to impeach the character of the plaintiff in mitigation of damages, the inquiries should relate either to the general character of the plaintiff for integrity and moral worth, or to his reputation in regard to conduct similar in character to the offense with which the defendant had charged him.

In the recent case of *Clark v. Brown*, 116 Mass. 505, the plaintiff was charged with larceny. The trial court admitted evidence that the plaintiff's reputation for honesty and integrity was bad, and excluded evidence that his reputation in respect to thieving was bad. But the full court held the exclusion of the latter evidence to be error, and reaffirmed the rule laid down in *Stone v. Varney*, 7 Met. 86, 39 Am. Dec. 762, and *Leonard v. Allen*, 11 Cush. 241, that ~~496~~ it was competent for the defendant to prove in mitigation of damages that the plaintiff's general reputation was bad, and that it was also bad in respect to the charges involved in the alleged slander.

In *Lamos v. Snell*, 6 N. H. 413, 25 Am. Dec. 468, the defendant's right to inquire into the plaintiff's "general character as a virtuous and honest man, or otherwise," was brought directly in question; and it was determined that the defendant was "not confined to evidence of character founded upon matters of the same nature as that specified in the charge, but may give in evidence the general bad character of the plaintiff . . . in mitigation of damages; and for this inquiry the plaintiff must stand prepared."

In *Eastland v. Caldwell*, 2 Bibb, 21, 4 Am. Dec. 668, the court say in the opinion: "In the estimation of damages the jury must take into consideration the general character of the plaintiff. . . . In this case the defendant's counsel was permitted by the court to inquire into the plaintiff's general character in relation to the facts in issue; but we are of opin-

ion he ought to have been permitted to inquire into his general moral character without relation to any particular species of immorality; for a man who is habitually addicted to every vice except the one with which he is charged is not entitled to as heavy damages as one possessing a fair moral character. The jury, who possess a large and almost unbounded discretion upon subjects of this kind, could have but very inadequate data for the quantum of damages if they are permitted only to know the plaintiff's general character in relation to the facts put in issue."

With respect to the form of the inquiry, it is said to be an inflexible rule of law that the only admissible evidence of a man's character, or actual nature and disposition, is his general reputation in the community where he resides: Chambers' Best on Evidence, 256, note. It would seem, therefore, that, in order to avoid eliciting an expression of the witness' opinion respecting the plaintiff's character, the appropriate form of interrogatory would be an inquiry calling directly for his knowledge of the plaintiff's general reputation in the community either as a man of moral worth, without restriction, or in the particular relation covered by the libel or slander.

497 2. But the plaintiff also has exceptions to the following instruction in the charge of the presiding justice: "I am requested by the counsel for the defendant to instruct you that if the plaintiff's conduct was such as to excite the defendant's suspicions, it should be considered in mitigation of damages, the plaintiff alleging that he had never been suspected of the crime alleged. I give you that instruction."

This request was doubtless suggested by the note to section 275 of 2 Greenleaf on Evidence, which appears to be based on the old case of *Earl of Leicester v. Walter*, 2 Camp. 251. But that case has long ceased to be recognized as authority for anything more than the admission of evidence of the plaintiff's general reputation. A similar intimation is found in *Larned v. Buffinton*, 3 Mass. 546; 3 Am. Dec. 185; but in *Alderman v. French*, 1 Pick. 18, 11 Am. Dec. 114, this dictum is declared to be unsupported by any authority. Again, in the later case of *Watson v. Moore*, 2 Cush. 134, it was held incompetent for the defendant, in an action of slander, to prove in mitigation of damages "circumstances which excited his suspicion, and furnished reasonable cause for belief on his part that the words spoken were true." The obvious objec-

tion to it is that the damages in an action of slander are to be "measured by the injury caused by the words spoken and not by the moral culpability of the speaker." We have seen that the defendant is permitted to prove that the plaintiff's general reputation is bad, because this evidence has a legitimate tendency to show that the injury is small; but the evidence of general report that the plaintiff is guilty of the imputed offense is inadmissible for the purpose of reducing damages: *Powers v. Cary*, 64 Me. 1; *Mapes v. Weeks*, 4 Wend. 659; *Stone v. Varney*, 7 Met. 86; 39 Am. Dec. 762. *A fortiori*, evidence of the defendant's suspicions, however excited, cannot be received for such a purpose": *Watson v. Moore*, 2 Cush. 134.

This instruction to the jury must therefore be held erroneous, and for this reason the entry must be exceptions sustained.

HASKELL, J., concurred in the result.

LIBEL—EVIDENCE IN MITIGATION OF DAMAGES—GENERAL REPUTATION OF PLAINTIFF.—Evidence of plaintiff's general bad character in libel is admissible in mitigation of damages under the general issue even though justification is pleaded: *Stone v. Varney*, 7 Met. 86; 39 Am. Dec. 762, and note; *King v. Root*, 4 Wend. 113; 21 Am. Dec. 102, and note; *Meutze v. Tutuer*, 77 Wis. 236; 20 Am. St. Rep. 115. See, also, the note to *Quinby v. Minnesota Tribune Co.*, 8 Am. St. Rep. 695, and especially the extended note to *Alderman v. French*, 11 Am. Dec. 130.

LIBEL—DAMAGES RECOVERABLE IN ACTIONS FOR.—Full compensation in damages, without reference to the actual malice or ill-will of the defendants, ought to be awarded to a plaintiff who has been injured in character and feelings by an unauthorized libelous publication: *King v. Root*, 4 Wend. 113; 21 Am. Dec. 102. In an action for libel, if it appears that the libel was published with no intent to injure, and that all proper precautions were observed in publishing it, actual damages only are recoverable: *Evening News Assn. v. Tryon*, 42 Mich. 549; 36 Am. Rep. 450. One who unlawfully interferes with the right of another to enjoy that degree of good-will and social and business distinction to which his acts and habits entitle him, by circulating slanderous reports, renders himself liable to consequential damages: *Savoie v. Scanlan*, 43 La. Ann. 967; 26 Am. St. Rep. 200. See, further, the extended notes to *Terwilliger v. Wanda*, 72 Am. Dec. 426, and *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 339, 342.

KNOWLTON v. DOHERTY.

[87 MAINE, 513.]

INTOXICATING LIQUORS—CONFLICT OF LAWS.—A vendor who sells intoxicating liquors in one state where such sale is valid to a purchaser who intends to sell them at retail in another state where such sale is illegal, cannot maintain an action for their price in the latter state if such action is prohibited by statute, although he did not know of the illegal intention of the purchaser nor participate therein.

INTOXICATING LIQUORS—INTERSTATE COMMERCE.—A statute providing that no action shall be maintained in the state upon any claim or demand for intoxicating liquors purchased out of the state with intention to sell them, or any part thereof, therein, is not in violation of that clause of the federal constitution giving to Congress the power to regulate commerce between the states, when applied to a purchase made outside the state with intent to sell at retail therein in violation of its law.

W. P. Thompson, for the plaintiff.

R. W. Rogers, for the defendant.

520 **WISWELL, J.** This case comes to the law court upon report, the court to render such judgment as the legal rights of the parties may require. The plaintiff in the original action recovered judgment upon default for three hundred and eighty-two dollars and thirty-seven cents debt and costs. The action was upon an account annexed amounting to three hundred and thirty dollars and thirty-eight cents, for intoxicating liquors sold by the original plaintiff to the defendant, and three dollars for packing.

The plaintiff in review relies upon the Revised Statutes, chapter 27, section 56, which, so far as it is material, is as follows: "No action shall be maintained upon any claim or demand, promissory note, or other security contracted or given for intoxicating liquors sold in violation of this chapter, or for any such liquors purchased out of the state with intention to sell the same, or any part thereof, in violation thereof."

In answer to which the defendant in review says that the sale of intoxicating liquors was not made in this state, and that consequently the statute does not apply. It may be conceded that the sale was made in Massachusetts. An agent of the vendor took the purchaser's order in Belfast, but there was no payment, no memorandum in writing, and the order was filled in Boston, where the liquors were separated from the general stock, packed, marked, and delivered to a steamboat company, in accordance with the purchaser's instructions, directed to him.

⁵²¹ We find from the evidence that the liquors were bought with an intention upon the part of the purchaser to sell them in this state in violation of law; and that the vendor, through his agent, had actual knowledge of such intention, but that he had no participation in the same, and did nothing, beyond the mere sale, to assist or facilitate the illegal act. The question then is presented, whether under the statutes in this state, a vendor who makes a sale of intoxicating liquors in another state, where such sale is not prohibited, under the circumstances above stated, can recover the purchase price therefor in the courts of our state.

It is a general principle of law that the validity of a contract must be tested by the law of the place where the sale is made. Were it not for the statute, which expressly forbids the maintenance of such an action, the price could be recovered, such a sale not being invalid, even if the vendor knew that the purchaser intended to put the things sold to an illegal use, unless he participated in that intention, or in some way, beyond the mere sale, did something to assist or facilitate the violation of law, or at least, in the language of some of the cases, made the sale with the knowledge that the thing sold was to be resold by the purchaser in another state contrary to its laws, and with a view to such resale: *Webster v. Munger*, 8 Gray, 584; *Graves v. Johnson*, 156 Mass. 211; 32 Am. St. Rep. 446.

The distinction between selling a thing with the mere knowledge that it is to be resold in violation of law, and in any way aiding in such illegal act, is sound and well recognized. Upon this principle were decided the cases in this state relied upon by the counsel for the defendant in review: *Torrey v. Corliss*, 33 Me. 333; *Banchor v. Cilley*, 38 Me. 553. But when *Torrey v. Corliss*, 33 Me. 333, was decided, there was no such statute as is now in force. The act of June 2, 1851, which was somewhat similar to our present statute, was passed while that action was pending, and the court expressly held that it did not apply; and *Banchor v. Cilley*, 38 Me. 553, was decided under the statute of 1846, which did not refer at all to sales made in other states. Some remarks made in the recent case of *Wasserboehr v. Boulier*, 84 Me. 165, 30 Am. St. Rep. 344, are also relied upon, but that case was decided upon ⁵²² the ground that the sale was made in Maine, and therefore illegal.

This very question was decided in *Meservey v. Gray*, 55

Me. 540, in which Mr. Justice Walton says: "It will be noticed that our present statute makes the fact that the liquors were purchased with intention of selling them in violation of law, and not the seller's knowledge of the fact, the criterion by which to determine whether the contract will support an action in this state or not. . . . If, therefore, the sale was made in New York, and the plaintiffs had no knowledge of the illegal purpose of the defendant to sell the liquors in this state in violation of law, yet, inasmuch as the evidence satisfies us, as a matter of fact, that they were intended for such illegal sale, the plaintiffs cannot recover for them."

In *McGlinchy v. Winchell*, 63 Me. 31, it is decided that it matters not that the liquors are purchased out of the state; if purchased with intent to sell the same in violation of law within the state, an action for the price cannot be maintained. These cases are decisive of the question at issue. There is no question of their correctness. The statute is explicit, and it is one which it was entirely competent for the legislature to enact.

The further contention is made that this statute is unconstitutional, or was prior to the act of Congress, approved August 8, 1890, making interstate commerce relating to intoxicating liquors subject to the police powers of the several states, because in violation of that clause of the federal constitution which gives Congress the power to regulate commerce between the states. The case of *Leisy v. Hardin*, 135 U. S. 100, is relied upon in support of this proposition. We think that there is no principle decided in that case which has any bearing upon the question under consideration. If the purchaser had bought the liquors with the intention of selling them in this state in the original packages, it would not, at that time, have been an intention to violate the law (*Leisy v. Hardin*, 135 U. S. 100; *State v. Burns*, 82 Me. 558), and consequently not within the terms of the statute; but in this case, as we have before said, we find that the liquors were bought with the intention of reselling them in this state in violation of law.

⁵²³ In accordance with the terms of the report, therefore, the entry should be, judgment for the plaintiff in review for the amount of the former judgment for debts and costs, with interest thereon from the time of rendition of said judgment. Costs in the review will follow.

INTOXICATING LIQUORS—CONFLICT OF LAWS.—The sale and delivery of liquors in Massachusetts with a view of having them resold by the purchaser in Maine, in violation of the laws of the latter state, will not sustain an action in the former state for the price agreed to be paid for such liquors: *Graves v. Johnson*, 156 Mass. 211; 32 Am. St. Rep. 446, and extended note fully discussing the subject.

HALL v. PERRY.

[87 MAINE, 509.]

WILLS—TESTAMENTARY CAPACITY.—THE BURDEN OF PROOF is upon the proponent of a will contested for want of testamentary capacity, to prove that the testator at the time of the execution of the will had a mind sound enough properly to devise and bequeath his property, and mental capacity sufficient to enable him to understand that he was making a will.

WILLS—DISPOSING MIND AND MEMORY.—A disposing mind in making a will involves the exercise of so much mind and memory as enables a person to transact common and simple kinds of business with that intelligence belonging to the weakest class of sound minds. A disposing memory exists only when one can recall the general nature, condition, and extent of his property, and his relations to those to whom he gives, and also to those from whom he excludes, his bounty.

WILLS—TESTAMENTARY CAPACITY.—TO HAVE A SOUND AND DISPOSING MIND AND MEMORY a testator must have active memory enough to bring to his mind the nature and particulars of the business to be transacted, and mental power enough to appreciate them, and act with sense and judgment in making his will.

WILLS.—TESTAMENTARY CAPACITY in a testator involves sufficient mental capacity to comprehend the condition of his property, his relations to the persons who are, or should be, the objects of his bounty, and the scope and bearing of the provisions of his will. He must have sufficient active memory to collect in his mind, without prompting, the particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive their obvious relations to one another, and be able to form some rational judgment in relation to them.

WILLS—TESTAMENTARY CAPACITY.—A sound and disposing mind in a testator does not imply that the powers of his mind may not have been weakened or impaired by old age or bodily disease. A testator may be incapacitated by age and failing memory from engaging in complex and intricate business, and incapable of understanding all parts of a contract, and yet be able to give simple directions for the disposition of his property by will. Great age may raise doubt of testamentary capacity, but it does not alone constitute testamentary disqualification.

WILLS—TESTAMENTARY CAPACITY.—Great age does not alone constitute testamentary incapacity if the testator had a mind and memory sufficient in essentials, and capable of acting rationally, and the will is in consonance with definite and long-settled intentions, is not unreasonable in its provisions, and has been executed with fairness.

WILLS—TESTAMENTARY CAPACITY—EXPERT EVIDENCE.—A family physician may express an opinion upon the actual condition of his patient's mind, but it is not competent for him to give a direct opinion upon his patient's mental capacity to make a will.

WILLS.—MENTAL CAPACITY to make a will, or what in any case shall be the standard of legal capacity, is a question of law.

WILLS—TESTAMENTARY CAPACITY.—Weakness of memory, vacillation of purpose, credulity and vagueness of thought, may all exist with adequate testamentary capacity under favorable circumstances.

C. E. and A. S. Littlefield, for the plaintiff.

A. A. Beaton and R. R. Ulmer, for the defendant.

570 **WHITEHOUSE, J.** This is an appeal from the decree of a judge of probate approving and allowing the will of Margaret B. Perry, of the following tenor:

"Know all men by these presents, that I, Margaret B. Perry, of Rockland, Knox county, Maine, being weak in body, but of sound and perfect mind and memory, do make, publish, and declare this my last will and testament, and herein dispose of all my worldly estate in manner following, to wit:

"First: I order and direct my executor hereinafter named to pay all my just debts and funeral charges as soon as may be after my decease.

"Second: I give and devise to my adopted son, Arthur C. Perry, for, and during the term of his natural life, the homestead upon which I now live, situate on Ocean street, in the city of Rockland, Maine, to have and to hold the same to him and his assigns, with all the appurtenances thereto belonging, for and during the term aforesaid. And I request the said Arthur C. Perry, if ever disposed to sell his right in the house and lot aforesaid, to give the first refusal of the same to my daughter, Mrs. Hezekiah Hall.

"Third: I give and bequeath to my daughter, Frank, wife of Hezekiah Hall, the sum of three hundred dollars (\$300.00).

"I also give and bequeath to my said daughter, Frank, the furniture now in the parlor bedroom, in my said house, together with the carpet now on the parlor floor of said house.

571 "Fourth: I give and devise to my granddaughter, Emma Perry, one of the children of said Arthur C. Perry, the reversion of the said house and lot, hereinbefore devised for life to said Arthur C. Perry. My intention being that on the death of said Arthur C. Perry, that said house and lot shall go to said Emma Perry, should she then be living. If

she should not be living, then I devise said reversion to the heirs of the said Arthur C. Perry.

"I also give and bequeath to the said Emma Perry the furniture now in the front chamber in my said house.

"Lastly: I give, bequeath, and devise to my said adopted son, Arthur C. Perry, his heirs and assigns forever, all the rest, residue, and remainder of my estate, real, personal, or mixed, wherever found and however situated; and I do hereby appoint the said Arthur C. Perry sole executor of this my last will and testament, hereby revoking all former wills by me made."

One of the reasons originally assigned for the appeal was, that the will was the result of undue influence on the part of Arthur C. Perry, but it is not seriously urged that there is sufficient evidence to establish this ground of appeal as an independent proposition.

The principal contention now is, that the testatrix was not of sound and disposing mind at the time of the execution of the will admitted to probate. This objection is also duly set forth in the reasons of appeal, and the question is now to be determined by the law court, without the aid of a jury trial, upon the evidence adduced at the hearing before the judge of probate, or so much thereof as may be deemed legally admissible, with certain additional facts agreed upon by the parties, and presented in the report as a part of the evidence.

The burden is upon the proponent to prove that the testatrix, at the time of the execution of the will, had mental capacity requisite to make a valid will. It is incumbent upon him to show that August 24, 1892, Margaret B. Perry was a "person of sound and disposing mind"; that she had a mind sound enough properly to devise and bequeath her property; that she had ⁵⁷² mental capacity sufficient to enable her to understand the business in which she was engaged when she made the will.

A "disposing mind" involves the exercise of so much mind and memory as would enable a person to transact common and simple kinds of business with that intelligence which belongs to the weakest class of sound minds; and a disposing memory exists when one can recall the general nature, condition, and extent of his property, and his relations to those to whom he gives, and also to those from whom he excludes, his bounty. He must have active memory enough to bring to his mind the nature and particulars of the business to be

transacted, and mental power enough to appreciate them, and act with sense and judgment in regard to them. He must have sufficient capacity to comprehend the condition of his property, his relations to the persons who were or should have been the objects of his bounty, and the scope and bearing of the provisions of his will. He must have sufficient active memory to collect in his mind, without prompting, the particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive, at least, their obvious relations to each other, and be able to form some rational judgment in relation to them: See *Robinson v. Adams*, 62 Me. 369; 16 Am. Rep. 473; *Barnes v. Barnes*, 66 Me. 286; *DeLafield v. Parish*, 25 N. Y. 9; 1 Redfield on Wills, 121-135; Schouler on Wills, sec. 68.

But mere intellectual feebleness must be distinguished from unsoundness of mind. The requirement of a "sound and disposing mind" does not imply that the powers of the mind may not have been weakened or impaired by old age or bodily disease. A person may be incapacitated by age and failing memory from engaging in complex and intricate business, and incapable of understanding all parts of a contract, and yet be able to give simple directions for the disposition of property by will. Great age may raise doubt of capacity, so far as to excite the vigilance of the court, but it does not alone constitute testamentary disqualification. On the contrary, as stated in *Maverick v. Reynolds*, 2 Bradford's Surrogate Reports, 360: "It calls for protection and aid to further its wishes when a mind capable of acting rationally, and ⁵⁷³ a memory sufficient in essentials are shown to have existed, and the last will is in consonance with definite and long-settled intentions, is not unreasonable in its provisions, and has been executed with fairness."

When the mental capacity of Margaret B. Perry is subjected to these recognized and familiar tests, it is the opinion of the court, after a careful examination of the evidence reported and of the elaborate arguments of counsel, that it was not devoid of any element requisite to make a valid will. The internal evidence afforded by the will in question executed by her August 24, 1892, is not only no impeachment of her testamentary capacity, but rather a confirmation of it. The leading provision of the will in which she gives the homestead to her "adopted son," Arthur C. Perry, during his life, and the remainder to his daughter, whom she mentions as

her "granddaughter, Emma Perry," appears to have been in conformity with a desire which she had long cherished, and a purpose which she had explicitly declared long before the execution of the will. It is the uncontradicted testimony of two witnesses that, two years and a half before the will was made, she stated to them that she "intended for Arthur to have the house," and that it was her husband's wish that Arthur should have it when they were done with it. Nor is there anything in the evidence tending to show that the disposition of her property according to the terms of this will was unreasonable or unnatural. It nowhere appears that the "adopted son" was in any respect unworthy of the benefit bestowed upon him; and it may properly be inferred from the evidence that, as her daughter, Mrs. Hall, was happily married and provided with a comfortable home, the testatrix considered her situation in life so fortunate as to place her beyond any need of her mother's bounty. The request that Mrs. Hall should have the refusal of Arthur's right in the house in the event of a sale, with the bequests to her of the parlor furniture and the sum of three hundred dollars, was a kindly remembrance, apparently evincing not only natural affection, but a sense of justice toward her daughter. And all the provisions of the will, examined without the aid of extrinsic evidence, would seem to indicate an active ⁵⁷⁴ memory on the part of the testatrix and a rational comprehension of the condition of her property and her relations to the beneficiaries named in the will.

The physical condition, manner of life, and general conduct of the testatrix about the time of the execution of the will, and the particular circumstances attending it, all strengthen the proponent's view of her testamentary capacity. True, the will was made less than four months before her death, when she was nearly seventy-eight years old, with some of the infirmities of age upon her; but she was then living in her own house, and was deemed capable of managing her own household affairs, receiving such kindly assistance as might be rendered from time to time by her daughter, who lived next door, and by the school teacher who boarded with her for two years immediately preceding her death. She appears to have visited the office of the attorney, who drew the will, two or three times before it was executed; but it was drawn in accordance with directions given by her two

weeks before, and again read to her in presence of the subscribing witnesses.

Two of these attesting witnesses give positive and unqualified testimony that they considered her of sound mind at that time, while the third, though not asked to state the opinion which he formed at that time, gives a circumstantial and detailed account of what transpired in his presence, from which it would appear that the conduct of the testatrix was entirely consistent, regular, and natural.

The testamentary capacity of the testatrix being presumptively established, the proponent rested; and thereupon the contestant introduced eight witnesses, including the daughter who contests the will, her husband, and her sister-in-law, the most of whom had been intimately acquainted with Mrs. Perry for many years, and all of them during the latter years of her life.

They represent her respectively, as childish, forgetful, and subject to dizzy spells; or as impatient, inconsiderate, and unreasonable, as indicated by her urging Dr. Cole to hasten the removal of a sick niece from her house, by her exaggeration of the amount of labor she performed in her daughter's household, ⁵⁷⁵ and by her complaints that her aged sister, whose mind was very much impaired, "tired her all out"; as changeable, forgetful, and liable to have "peculiar ideas," as instanced by her belief that Arthur Perry was able to hire a place at a large rental; as not sleeping well one night after talking with Arthur Perry; or as excitable and subject to headache and dizziness; or as breaking down in consequence of the severe illness of her husband, eleven years before; or again, as growing more feeble, childish, and weak-minded during the last year of her life, her mind failing with her body. On cross-examination, however, one of these witnesses thought Mrs. Perry's condition was "about the same as other old ladies of her age."

The contestant also attaches great significance to the fact that while there is in the will a bequest of "the sum of three hundred dollars" in favor of the daughter, in addition to the gift of the furniture in the parlor bedroom and of the parlor carpet, the schedule of assets appraised discloses a total value of one hundred and forty-one dollars and sixteen cents, of which only eleven dollars and sixty-six cents is money. Two of the subscribing witnesses to the will received the impression that she had three hundred dollars in some

bank, but it appears from the testimony of the contestant and her husband, Captain Hall, that although the personal property inventoried all came into the possession of Captain Hall, and was found in his hands after the death of Mrs. Perry, no money or other property was found anywhere except that named in the inventory. It is, therefore, earnestly contended that Mrs. Perry was laboring under the delusion that she had three hundred dollars deposited in some bank, and attempted to bequeath that amount to her daughter, when in fact she was not possessed of a single dollar outside of the real estate devised to Arthur C. Perry and his daughter, valued at eight hundred dollars, and her household goods, and eleven dollars and sixty-six cents in money, appraised at one hundred and forty-one dollars and sixteen cents. It appears that her taxes were abated, and that her only means of support were derived from a pension of twelve dollars a month during the later years, and eight dollars a month during the earlier years ⁵⁷⁶ following her husband's death, with such sums as she may have received from boarders; and while it does not seem from the evidence highly probable that she had three hundred dollars in money at the time of her death, it is not conclusively established that she did not have it at the time she made the will. Again, it is not an extraordinary hypothesis to assume that she greatly overestimated the value of her household furniture and other personal effects, and believed that at least three hundred dollars would be realized from the sale of these after the specific bequests to the daughter and Emma Perry had been set apart. The apparent inconsistency is susceptible of other plausible explanations; but the existence of the discrepancy is not so indubitable that it can safely be accepted as conclusive proof of an insane delusion; and, in any event, its significance would not be so strong that it might not be overcome by the great weight of other evidential facts and circumstances tending strongly the other way.

Nor do we think that the testimony of Dr. Estabrook, who was called as the family physician of the testatrix, and allowed to give his opinion as an expert respecting her competency to make a will, is entitled to the weight which the contestant would give it. It appears that he was not consulted by her professionally for more than a year prior to the execution of the will; but he states that "she has been a feeble woman, suffering from uterine trouble peculiar to

women," and was "in a feeble condition of mind." When required in direct examination to state if she had "sufficient intelligence to make a will," he says: "I don't know as I can; I am not quite prepared for it coming in that shape"; and when pressed to answer, assuming her condition to be as he had described it, and that she had undertaken to dispose of property that she did not possess, he properly replied in substance that he did not understand "what the condition of a person's mind should be to be rendered competent to make a will." The learned counsel thereupon stated some of the principal requisites of testamentary capacity, and the witness answered: "If she should give away somebody else's property or property that was not her own, I should say she was not ⁵⁷⁷ competent." The counsel then said: "The question is, taking all these things into account, with your knowledge of her, her condition when you saw her, what the witnesses say of her loss of memory, her increased impatience, her treatment of her daughter, and her frequent dizziness, now, whether taking all those facts into account, she had such competency as I have described, and was capable of making a will?" A. "I think not."

It is plain, however, that if the element of "giving away property not her own" be eliminated, there are no facts stated by this witness in his description of Mrs. Perry's physical and mental condition that will warrant his conclusion that she did not have mental capacity to make a will.

But though the witness was authorized, as a family physician, to express an opinion upon the actual condition of his patient's mind (*Fayette v. Chesterville*, 77 Me. 28; 52 Am. Rep. 741), it was not competent for him to give an opinion upon the direct question of Mrs. Perry's capacity to make a will. A question calling for a direct expression of opinion from an expert, whether a testator had "sufficient intelligence," or "mental capacity," or was "competent" to make a will, is not the appropriate form of inquiry to elicit opinion evidence which will most satisfactorily enlighten and assist the court and jury in determining that issue. An expert should not be required thus to invade the province of the court and jury. What is sufficient capacity to make a will is not simply a question of fact; it is rather a conclusion which the law deduces from certain facts proved or admitted as premises. As stated by the court in *Fairchild v. Bascomb*, 35 Vt. 398: "A witness may not correctly apprehend the rule

of law, and, if he uses such expressions, may be misled himself, or may mislead the jury. Hence the question should be framed so as to require him to state the measure of the testator's capacity in his own language, and by such ordinary terms or forms of expression as will best convey his own ideas of the matter"; or, to use the language of the court in *Crowell v. Kirk*, 3 Dev. 355, 358, "to state the degree of intelligence or imbecility the best way he can." So, in *Kempsey v. McGinnis*, 21 Mich. 123, the ⁵⁷⁸ court, by Christiancy, J., use this language: "Capacity to make a will, or what in any case shall be the standard of legal capacity, is always a question of law. The physical or mental condition from which that capacity may be deduced is a question of fact, which may be shown by evidence of physical or mental manifestations, and the opinions of professional witnesses as inferences of fact thereon. There has been some looseness in the courts in permitting opinions to be given upon a testator's capacity, . . . but that mode of putting the question is objectionable."

In *May v. Bradlee*, 127 Mass. 414, it is said the court "might properly refuse to allow the question to be put in that form, because it called for an opinion upon a mixed question of law and fact, and not upon a question of medical science only. What degree of mental capacity is necessary to the making of a will is a question of law, which was not to be determined by the witness, and as to which he could not be assumed to be informed, unless the legal requisites of testamentary capacity were stated in the interrogatory, or otherwise explained to him." But it is obvious that even with such an explanation, incomplete as it would ordinarily be, when hastily given under such circumstances, a medical expert could not instantly grasp and fully appreciate all of the legal requisites of testamentary capacity, and that form of inquiry would still be objectionable. The more simple and better form of inquiry "relates to mental soundness or unsoundness, with reference, as near as may be, to the particular act or kind of act in dispute": Schouler on Wills, sec. 208. See also Lawson on Expert and Opinion Evidence, 137, Case 4.

But the proponent presents in rebuttal nine witnesses, neighbors and friends of Mrs. Perry, and with one exception all disinterested and not related to either of the parties.

Their combined testimony covers a period of nearly thirty

years prior to her death, and comprises the condition, conduct, and habits of life of Mrs. Perry in their varied relations with her of a business and social character during all this time. They discovered no material change in her appearance or manner, and no peculiarities in her conversation or conduct. One ⁵⁷⁹ witness set out blackberry bushes in her garden late in the fall after the will was made in August; she waited upon him, "got the things" for him, and directed him how to perform the work, and he followed her directions. None of them observed anything "particular" or "peculiar" in her habits not characteristic of other ladies of her age and experience in life. She may have been more forgetful of the present than of the past, and may frequently have forgotten what she had just before said or done. She may have been childish, changeable, impatient, and sometimes inconsiderate; her judgment in relation to the value of property may not have been the most reliable, and her mind may not have been vigorous enough to grasp all the features of a complicated transaction; but all this may be said of multitudes of elderly people whose competency to manage simple and ordinary kinds of business is never questioned by their acquaintances and friends. "Weakness of memory, vacillation of purpose, credulity and vagueness of thought, may all consist with adequate testamentary capacity under favorable circumstances": Schouler on Wills, sec. 70. "It is one of the painful consequences of extreme old age," says Chancellor Kent, "that it ceases to excite interest, and is apt to be left solitary and neglected. The control which the law still gives to a man over the disposal of his property is one of the most efficient means which he has in protracted life to command the attention due his infirmities": *Van Alst v. Hunter*, 5 Johns. Ch. 148.

Appeal dismissed. Decree of probate court affirmed.

WILLS—TESTAMENTARY CAPACITY—BURDEN OF PROOF.—The burden of proof is always upon the party contesting a will to show the incapacity of the testator: *Hastis v. Montgomery*, 95 Ala. 486; 36 Am. St. Rep. 227, and note; *Knox v. Knox*, 95 Ala. 495; 36 Am. St. Rep. 235.

WILLS—TESTAMENTARY CAPACITY—TEST OF.—One who at the time of executing a will has mind and memory sufficient to recall and remember the property he is about to bequeath, the object of his bounty and the disposition which he wishes to make, to know and understand the nature and consequences of the business to be performed, and to discern the simple and obvious relations of its elements to each other, has a sound and disposing

mind and memory: *Burney v. Torrey*, 100 Ala. 157; 46 Am. St. Rep. 33, and note; *Knox v. Knox*, 95 Ala. 495; 36 Am. St. Rep. 235, and note.

WILLS—TESTAMENTARY CAPACITY—OLD AGE, WEAK MEMORY AS AFFECTING.—The fact that a testator when he made his will was seventy-five years of age, weak, and feeble, nervous, irritable, absent-minded, and of feeble memory, does not establish his want of testamentary capacity if he had a strong will and a good understanding of all the business in which he was engaged: *In re Cline's Will*, 24 Or. 175; 41 Am. St. Rep. 851, and note. Mere physical weakness or disease, old age, eccentricities, blunted perceptions, weakening judgment, failing memory or mind, are not necessarily inconsistent with testamentary capacity, but evidence of such facts, or any of them, should be submitted to the jury to aid in determining whether or not the testator had sufficient capacity at the time of executing his will: *Richmond's Appeal*, 59 Conn. 226; 21 Am. St. Rep. 85.

WILLS—TESTAMENTARY CAPACITY—TESTIMONY OF PHYSICIANS AS TO.—Physicians are allowed to give their opinion as to the sanity of a testator from the symptoms and circumstances which come within their observation, or as testified to by others: *Potts v. House*, 6 Ga. 324; 50 Am. Dec. 329, and note. See, also, the extended note to *Hammond v. Woodman*, 66 Am. Dec. 234.

CASES
IN THE
SUPREME COURT
OF
MARYLAND.

GARRISON v. HILL.

[79 MARYLAND, 75.]

CONTINGENT ESTATES OF INHERITANCE WILL PASS by descent, and are also devisable, but only those can take who are in esse when the contingency happens, and the estate falls into possession.

WILL—CONSTRUCTION OF—DEVISE.—If a life estate in property is devised by will to a woman, with remainder to her children, if she leaves any, and to her brother if she does not leave any, and the brother dies first, and she dies without issue, having devised the property to her mother, the estate will pass to the heirs of the remainderman alive when the sister died. She not being in esse when the contingency happened, and the estate fell into possession, could neither inherit nor devise it. It would not, therefore, pass to her upon the remainderman's death, and could not pass by her will to her mother.

ACTION of ejectment. The plaintiff, Mary De Charms Garrison, was Maria M. Johnson's niece, and the defendant, Thomas Hill, was the devisee in trust for Emma Maria C. Johnson, under the will of Maria E. Weise. There was a judgment for the defendant, and the plaintiff appealed.

Hyland P. Stewart and John Prentiss Poe, attorney general,
for the appellants.

Thomas Ireland Elliott, for the appellee.

79 BRISCOE, J. This is an appeal in an action of ejectment. The property sought to be recovered is real estate, situate on Lexington street, in Baltimore city, together with its rents and profits.

The main questions for our consideration arise upon a construction of the fifth item of the will of a certain Maria E. Weise, and the will of a certain Emma M. C. Johnson.

By the fifth clause of the will of Maria E. Weise she devised as follows: "All the rest, residue, and remainder of my estate, effects, and property of every kind and description whatsoever, inclusive of my house and lot of ground on Lexington street, I give, devise, and bequeath to Thomas Hill, of the city of Baltimore. In trust and special confidence, however, for the separate use and benefit of my cousin, the said Emma Maria C. Johnson, for and during the term of her natural life, so that she during that period be permitted and suffered to have, receive, ^{so} take, and enjoy the rents, issues, and profits of said residuary estate and property, free from the control, power, or disposal of any future husband she may marry; and from and after the death of said Emma Maria C. Johnson, in trust, that the said residuum shall go to and become the property of any children of the said Emma Maria C. Johnson, their heirs and assigns, absolutely; but, in case the said Emma Maria C. Johnson should depart this life without leaving a child or children, or descendants of a child, living at the time of her decease, then the said trust property and premises shall go to my cousin, the said William Worthington Johnson, absolutely."

The will was dated April 12, 1880, and was duly executed to pass real estate. The testatrix died December 7, 1881, unmarried, and without issue.

Emma M. C. Johnson executed her last will and testament on the 23d of August, 1887, and died April 22, 1891, unmarried, and without issue. By her will she devised and bequeathed, after the payment of her debts and funeral expenses, all her property to her mother, Maria M. Johnson.

After the death of the testatrix the life tenant, Emma M. C. Johnson, received the rents and profits of the property until her death. William Worthington Johnson, the remainderman under the will, died on the 14th of October, 1886, intestate, unmarried, and without leaving issue, but left an only sister, Emma M. C. Johnson, and Maria M. Johnson, his mother. The latter died in January, 1889.

Upon this state of facts the question then is, Do the heirs at law of William Worthington Johnson, the remainderman, take the interest in the property which he would have taken had he survived the life tenant, Emma, or did it descend to his sister Emma, who was living at the time of his death, and pass under her will to her mother, Maria M. Johnson?

Here there is, first, a life estate given to Emma Johnson,

and a remainder is limited with a double aspect—if she left ^{one} children, then to them in fee, if she left none, which contingency actually happened, then the devise is to William Worthington Johnson.

It is well settled that contingent estates of inheritance will pass by descent and are also devisable: *Reid v. Walbach*, 75 Md. 205.

But while this is true, and it is unnecessary to refer to the cases, or to discuss the principles upon which they rest, yet it is also clear that those only can take who were *in esse* at the time when the contingency happened, and the estate falls into possession. Justice Story, in the case of *Barnitz v. Casey*, 7 Cranch, 456, states the rule thus: "It is very clear that contingent remainders and executory devises at common law are transmissible to the heirs of the party to whom they are limited, if he chance to die before the contingency happens." It was held in that case that those who were heirs of the remainderman on the 12th of February, 1808, the date of the happening of the contingency, were entitled to the estate, though he had died in 1802, six years before the contingency happened. And to the same effect are the cases of *Spence v. Robins*, 6 Gill & J. 512; 26 Am. Dec. 587; *Snively v. Beavans*, 1 Md. 222; *Buck v. Lantz*, 49 Md. 444; *Demill v. Reid*, 71 Md. 190; *Goodright v. Scarle*, 2 Wils. 34. Applying, then, this well-established doctrine to the facts of the case now under consideration, we are clearly of the opinion that as the contingency—the death of the life tenant, Emma, without children—did not occur until five years after the death of the remainderman, she could not be heir or take or transmit any interest in the estate by will or otherwise. She was not *in esse* when the contingency happened, and when the estate fell into possession. Being dead, she could neither inherit nor devise it. The property, therefore, passed to those of William Worthington Johnson's heirs alive at the happening of the contingency, viz., the death of Emma M. C. Johnson, unmarried ^{and} and without issue. The plaintiffs' prayers were therefore properly rejected. The first prayer was defective, because it proceeded upon the theory that when the remainderman, William, died on the 14th of October, 1886, his contingent interest passed to his sister Emma, and, uniting with her life estate, created a fee which was transmissible by will to her mother, and passed from her to the plaintiffs. This, for the reasons we have given, was error. The second

prayer involves the proposition that the estate devised to the trustee was executed by the statute of uses, the life tenant, Emma M. C. Johnson, being an unmarried woman, that thereby the said Emma became the owner of the legal life estate therein, and the fee was vested in the heir at law of the testatrix, Maria E. Weise. This prayer, for the reasons we have assigned, was also erroneous.

The first, second, third, and fourth prayers of the defendant were properly granted, and contained the correct propositions of law bearing upon the case.

The fifth prayer granted on behalf of the defendant instructed the jury that there was no legally sufficient evidence in the case to entitle the plaintiffs to recover. This prayer was correct, and was properly granted under the facts of the case. The judgment below being for the defendant, and finding no error in the rulings of the court, we shall affirm the judgment.

Judgment affirmed.

CONTINGENT REMAINDERS AND EXECUTORY DEVICES are transmissible and consequently devisable: *Spence v. Robins*, 6 Gill & J. 507; 26 Am. Dec. 587, 590. A remainder is contingent if the persons who are to take are not in esse, or are not definitely ascertained: Note to *Ducker v. Burnham*, 37 Am. St. Rep. 146. The interest of a remainderman, dying before the termination of the life estate, descends to his heirs, where the remainder is vested: *Bufford v. Holliman*, 10 Tex. 560; 60 Am. Dec. 223; and this appears to be true in the case of a contingent remainder: *Spence v. Robins*, 6 Gill & J. 507; 26 Am. Dec. 587, 590. 136 & 137. 577

FIRST NAT. BANK OF BALTIMORE v. LINDENSTRUTH.

[79 MARYLAND, 126.]

CHATTEL MORTGAGES—AFTER-ACQUIRED PROPERTY.—No lien on after-acquired goods is created by a provision in a mortgage of a stock of goods that all stock replaced after the sale of any of the stock shall be substituted for the stock originally covered thereby. Such a provision is at law a nullity, though it does not, of itself, render the mortgage void as fraudulent.

CHATTEL MORTGAGES—INTERMINGLING OF PROPERTY—EXECUTION.—If after-acquired goods have been so intermingled with the property covered by a chattel mortgage as not to be distinguishable from the latter, and this has been done with the knowledge of the mortgagee and for his benefit, a judgment creditor of the mortgagor may lawfully levy upon and sell the whole or so much thereof as may be necessary to satisfy his debt.

CHATTEL MORTGAGES—JURISDICTION OF EQUITY TO SET ASIDE.—If a mortgage is ineffective at law to include after-acquired property, and such

property is so intermingled with that embraced in the mortgage as to destroy the identity of the latter, thereby rendering the whole subject to levy and sale on execution, there is no necessity for resorting to a court of equity to set aside the mortgage, to appoint a receiver, and to sell the property, and equity has no jurisdiction, under the circumstances, to grant such relief.

Alexander Preston and J. Alexander Preston, for the appellant.

Thomas C. Weeks, for the appellee the Brewing Company.

C. Dodd McFarland and Peter J. Campbell, for the appellee Lindenstruth and the Baltimore Savings Institution.

¹³⁷ *McSHERRY, J.* On August 20, 1890, Lindenstruth borrowed five thousand five hundred dollars in cash from the George Bauernschmidt Brewing Company of Baltimore, and at the same time, and to secure the repayment of the loan, executed and delivered to the lender a mortgage conveying both real and personal property, and likewise all of the mortgagor's "stock in trade, such as whiskies, brandies, wines, liquors of any sort and description." Amongst other things, the mortgage contained the following provision: "And it is hereby expressly understood that all stock and goods hereby granted shall be held liable for the said sum of five thousand five hundred dollars, and the interest thereon, until paid; and that all stock of goods replaced after the sale of any or all of the stock, goods, merchandise, and other property hereby granted shall be substituted for those hereby granted, and the debt hereby secured ¹³⁸ shall be a lien upon all of said stock or goods now on hand or substituted for the stock, goods, and other property granted." In November, 1892, the First National Bank of Baltimore obtained a judgment against Lindenstruth upon a cause of action which existed prior to the execution of the mortgage. A fieri facias was issued on this judgment, and was returned nulla bona, and shortly thereafter the bank filed a bill of complaint in circuit court No. 2 of Baltimore city, alleging that Lindenstruth was largely indebted; that he was without the means to pay his debts apart from the property covered by the mortgage; that the conveyance was made to hinder, delay, and defraud his creditors, and that it contained provisions which were utterly void. Later on an amended bill was filed charging, in addition to the averments of the original bill, that the mortgage had, in fact, hindered, delayed, and prevented the plaintiff from col-

lecting its judgment, and further, that the property was more than sufficient to pay the mortgage debt and the plaintiff's claim. It also charged that some of the goods and stock conveyed by the mortgage had been sold and replaced by other goods and stock, and that these latter had been so mixed and intermingled with those covered by the mortgage that they could not be identified or distinguished from the goods and stock originally transferred by the mortgage. The relief prayed was that the mortgage might be set aside; that a receiver might be appointed; that the mortgaged property might be sold, and that the claim of the plaintiff might be paid after the debt secured by the mortgage had been first satisfied. There was likewise a prayer for general relief. A demurrer was interposed to the amended bill, but was overruled, and the answers previously filed to the original bill were adopted as answers to the amended bill. Testimony was taken, and upon final hearing the court (Wickes, J.) dismissed the bill of complaint, with costs; and from that decree this appeal was taken.

¹³⁹ The testimony shows, beyond a cavil or a doubt, that the cash was actually loaned by the brewing company to Lindenstruth in absolute good faith when the mortgage was executed; and there is nothing whatever in the record even suggestive of a suspicion that the mortgagor and mortgagee combined or confederated to defraud any creditor of Lindenstruth. Indeed, it was not pretended in the discussion at the bar that there was any evidence of actual fraud apart from that which it was insisted the provisions of the mortgage disclosed. These provisions are the ones we have already quoted, and they are relied on as sufficient to condemn and avoid the instrument.

It is quite true courts of high authority have held that a mortgage conveying a stock in trade and containing an express covenant, or accompanied by an independent agreement, permitting the mortgagor to remain in possession for the purpose of selling the mortgaged articles for his own use and benefit, or for the purpose of replacing such of them as he might sell, is null and void as to creditors of the mortgagor, because fraudulent in law, without reference to the bona fides of the mortgage debt or the honesty of the mortgagor's intention: *Robinson v. Elliott*, 22 Wall. 513; *Davenport v. Foulke*, 68 Ind. 382; 34 Am. Rep. 265; *Voorhis v. Langsdorf*, 81 Mo. 451; *Collins v. Myers*, 16 Ohio, 547; *Freeman v. Rawson*, 5

Ohio St. 1; *Southard v. Benner*, 72 N. Y. 424; *Place v. Langworthy*, 13 Wis. 629; 80 Am. Dec. 758; *Edgell v. Hart*, 9 N. Y. 213; 59 Am. Dec. 532. And it is also true other courts entitled to equal respect have held that such a mortgage is not *per se* void, but that the reservation of a power thus to sell is only evidence of a fraudulent intent for the consideration of the tribunal which has to determine the question of fraud: *Oliver v. Eaton*, 7 Mich. 108; *Cheatham v. Hawkins*, 76 N. C. 335; *Fletcher v. Powers*, 131 Mass. 333; *Van Meter v. Estill*, 78 Ky. 456; *Fisher v. Syfers*, 109 Ind. 514.

¹⁴⁰ But we are not now confronted with this precise question. The mortgage contains no clause giving the mortgagor power to sell the mortgaged property, either for his own use or for the purpose of replenishing the stock; and there is no evidence in the record tending to establish the existence of a collateral, independent agreement between the mortgagor and mortgagee conferring upon the former such authority. Mere possession by the mortgagor of the mortgaged property is not, under our registry laws, a badge or indication of fraud; and to hold that a merchant cannot mortgage his goods without closing his doors would be to hold that a chattel mortgage upon such property is worthless: *Gay v. Bidwell*, 7 Mich. 520. The clause we have cited from the mortgage attempts to make provision for subjecting to the lien of the mortgage after-acquired stock in trade, and whilst contemplating, as its language imports, the obvious contingency that some of the stock would or might be sold in the ordinary course of business unless the mortgagor should close his doors at once and discontinue his occupation altogether, it did not, in terms, reserve to him either the right or the power to sell the mortgaged property for his own use and benefit, or for any other purpose. On the contrary, the clause in question, by declaring that all stock substituted for the stock sold should be subject to the lien of the mortgage, indicates that the parties intended that the mortgagor should not make such sales for his own interest and advantage, but that, if he did make any sales of the mortgaged stock, they should inure to the benefit and security of the mortgagee. This clause, therefore, whilst conferring no authority upon the mortgagor to make sale of the mortgaged stock in trade, made, or undertook to make, provision for subjecting after-acquired stock in trade to the lien of the mortgage.

But such a provision, whilst not of itself rendering the mortgage void, as fraudulent, is at law simply a nullity. It is the settled doctrine of the Maryland courts that a provision ¹⁴¹ such as this in an ordinary mortgage creates no lien at law on after-acquired property: *Hamilton v. Rogers*, 8 Md. 301; *Rose v. Bevan*, 10 Md. 466; 69 Am. Dec. 170; *Wilson v. Wilson*, 37 Md. 1; 11 Am. Rep. 518; *Crocker v. Hopps*, 78 Md. 260. There are conditions under which a covenant like this would be held valid in equity, but they are not presented here: *Butler v. Rahm*, 46 Md. 541.

Inasmuch, then, as the mortgage was ineffectual to create at law a lien upon after-acquired property, it follows that, as to all such property, the mortgage was no impediment to the enforcement of the execution issued on the bank's judgment. And if, with the knowledge of the mortgagee, and for its benefit, this after-acquired property has been so intermingled with the property embraced in the mortgage as not to be distinguishable from the latter, as alleged in the amended bill of complaint, a judgment creditor of the mortgagor could lawfully levy upon and sell the whole, or so much thereof as might be necessary to satisfy his debt: *Hamilton v. Rogers*, 8 Md. 301; *Chappell v. Cox*, 18 Md. 513. It results, then, that as the clause which we have been considering was wholly ineffective at law to include after-acquired property, and as the mingling of such property with that covered by the mortgage destroyed the identity of the latter and rendered the whole of it liable to seizure and sale under the *feri facias*, there was no necessity for resorting to a court of equity to set aside the mortgage, and there was no power or jurisdiction in that court to grant, under these circumstances, the relief sought under the bill of complaint. Necessarily, therefore, the decree dismissing the bill was right, and must be affirmed.

Decree affirmed, with costs.

CHATTEL MORTGAGES—AFTER-ACQUIRED, SUBSTITUTED, AND INTERMINGLED PROPERTY.—A mortgage of personal property does not cover that substituted for it, or purchased with the proceeds of the sale thereof: *Rose v. Bevan*, 10 Md. 466; 69 Am. Dec. 170, and note; monographic note to *Gregg v. Sanford*, 76 Am. Dec. 727, on effect of mortgage on after-acquired personal property; though in some of the cases it has been held that substituted articles become subject to the mortgage: See monographic note to *Moody v. Wright*, 46 Am. Dec. 715, on mortgage of after-acquired property. A recorded chattel mortgage providing that the mortgagor may sell the mortgaged property from time to time, replacing that sold with other of like

kind and value, the substituted property to be subject to the terms of the mortgage, is valid, and where the mortgagee takes possession with the consent of the mortgagor he can hold the property, original and substituted, as against a subsequent attaching creditor of the mortgagor: *Peabody v. Landon*, 61 Vt. 318; 15 Am. St. Rep. 903, and monographic note thereto on the effect of a chattel mortgage which allows the mortgagor to retain possession and to sell the property. Compare *Roundy v. Converse*, 71 Wis. 524; 5 Am. St. Rep. 240. There are cases, however, holding that a mortgage of goods in a store, "together with all renewals and substitutions for the same," does not convey subsequently-acquired goods so as to give the mortgagee an action at law against a party seizing them: Note to *McCaffrey v. Woodin*, 22 Am. Rep. 656; particularly where the mortgagee does not take possession: note to *Parker v. Jacobs*, 37 Am. Rep. 728. In *Morrill v. Noyes*, 56 Me. 458; 96 Am. Dec. 486, it is held that a mortgage of personal property not at the time in existence cannot, as a general rule, be upheld or enforced in a suit at law; and in *Steele v. Ashenfelter*, 40 Neb. 770, 42 Am. St. Rep. 694, it is held that a mortgage of property to be thereafter acquired is invalid as against purchasers and attaching creditors of the mortgagor. A mortgage permitting the mortgagor to remain in possession and continue the business of buying and selling the goods is void as to creditors of the mortgagor, but whether such a permission necessarily makes the mortgage fraudulent is a disputed question. The mortgagee will, however, at least lose his lien on the goods sold, and it will not reattach to the new and substituted stock, though it is purchased with the proceeds of the mortgaged goods: Note to *Pulcifer v. Page*, 54 Am. Dec. 595, discussing the confusion of mortgaged goods, and showing that where the mortgagor, with the consent of the mortgagee, mingles by sale and purchase other goods indistinguishably with the mortgaged goods, the lien is not destroyed, but that it will not avail against the liens of third persons: Compare note to *Gregg v. Sanford*, 76 Am. Dec. 727, discussing the question of renewal, substitution, and commingling of goods.

MERGENTHALER v. KIRBY.

[79 MARYLAND, 182.]

TRESPASS—CHILDREN—DAMAGES—NONSUIT.—If a child, while trespassing upon the open premises of a factory where typesetting machines are manufactured, and there purloining type metal or scrap iron belonging to the manufacturer, is injured by the sudden discharge of water and steam from a pipe connected with an engine in the factory, the presence of the child being unknown to the engineer, the manufacturer not owing any duty to the child, under such circumstances, is not liable in an action by its father to recover damages for the injury and for the amount expended for medicines and medical attention.

Charles W. Field, for the appellant.

W. Baltzell Jenkins and Henry J. Broening, for the appellee.

¹⁸⁸ **FOWLER, J.** The defendant is a manufacturer of typesetting machines, and his factory is located in Baltimore city,

about six hundred feet south of Fort avenue, and about half that distance from the southern extremity of Burroughs street. On the east and west of the factory for several hundred yards there are open lots or commons. The nearest house is one block distant, at the foot of Burroughs street. To the south are the Baltimore and Ohio railroad tracks and the river. It is apparent from this description that the defendant's factory is not in a built-up or densely populated part of the city.

Howard Kirby, a boy about twelve years old, together with two companions, aged respectively fourteen and sixteen, went upon the premises just mentioned, without the authority or knowledge of the defendant or of any of his agents or employees, for the purpose of getting type metal or lead scrap, which was in a box near the factory wall, which metal had a value of eight cents per pound, and had been placed there by the defendant's orders. His employees had directions always to pick over the contents of this box and to save the metal for use in the factory.

One of the boys testified that he had before sold the lead and scrap to a junk dealer, and intended to make the same disposition of what he secured or expected to secure the day Kirby was injured. While the boys were thus engaged in trespassing on the defendant's premises and purloining his property, the engineer in charge of the engine "blew the boiler off to ease the pressure on it, for reasons of safety." Of course, it is not suggested that there was any intention of injuring the boys, for their presence was unknown to the engineer. But while they were standing between the scrap box and the end of the pipe, the water and steam rushed out, and the boy Kirby was unfortunately scalded. However, if instead of running, as he did, between the mouth of the pipe and the wall of the factory, he had passed on the other side, he ¹⁸⁴ would have been uninjured. The defendant testified that "there was room enough between the box and the coal-bins for the boys to run behind the pipe instead of in front of it, if they had chosen to do so." The evidence is that the pipe came out from under the south wall of the engine-room, and ran southerly under ground about fifteen feet alongside of and four or five feet from the west wall of the factory. A joint or elbow about three feet long was screwed on the end of the pipe and tilted over at an angle toward the wall of the factory. The factory yard, in which the pipe was located,

was inclosed on three sides by the engine-room, the factory, and the coal-bins.

The defendant was sued by the father of the injured boy to recover damages arising from injury to his son, and for the amount expended for medicines and medical attention.

Several prayers were offered on both sides, but the controlling question is whether in any aspect of the case, as presented, the plaintiff was entitled to a verdict. The jury found in favor of the plaintiff, and the defendant has appealed.

In our opinion the case should have been taken from the jury. One of the fundamental rules governing all cases of this kind is that the plaintiff cannot recover unless he establishes "a right on his part, a duty on the part of the defendant in respect to that right, and a breach of that duty by the defendant, whereby the plaintiff has suffered injury": *Maenner v. Carroll*, 46 Md. 212. In the case just cited the plaintiff, as here, was a trespasser, and "having no right to be on the lot, the injury which he suffered by falling into an excavation," the court held, "must be attributed exclusively to his own fault." As we understand the contention of the appellee it is, that it was a neglect or breach of duty on the part of the defendant to use the pipe in question as it was used, for the purpose of emptying the surplus water and steam into the ¹⁸⁵ yard in the rear of his factory, which yard, as we have seen, is inclosed on three sides. We know of no principle of law which will justify such a proposition. On the contrary, to hold an owner liable under such circumstances would, as was said in *Frost v. Eastern R. R.*, 64 N. H. 221, 10 Am. St. Rep. 396, be an unreasonable restriction of his enjoyment and use of his land.

None of the cases cited by the appellee sustain, as we think, the position he is here contending for, and, if they did, we could not assent to them. In *Stone v. Dry Dock etc. R. R. Co.*, 115 N. Y. 104, the child was injured on a public street where it had a right to be. In *Hydraulic Works Co. v. Orr*, 83 Pa. St. 332, several children were injured by the falling of a trap-door or inclined way, and the court say: "The gate and passageway opened out upon a public and much frequented street, where persons were passing and children were playing. Unlike an ordinary private alley, this passage was often open, and therefore liable to the incursions of children, and even grown persons, from thoughtlessness, accident, or curiosity. Now, the inclined way which did the injury was a

dangerous trap. . . . When not lowered it stood upright against the wall, leaning so little beyond the center of gravity that a jar or slight pull would cause it to fall forward." In this case a verdict against the defendant was sustained, but the court was careful to distinguish it from a case like the one we are considering, and said "that, where no duty is owed, no liability arises," and that when one enters a private yard, and is injured by falling into an open well or otherwise, he can have no action against the owner, unless he were present and could have prevented the injury. "The person injured had no business there, and the owner owed him no duty." In *Barry v. New York Cent. etc. R. R. Co.*, 92 N. Y. 289, 44 Am. Rep. 377, another case relied on by the appellee, but not sustaining his view, was where a child ten years old was injured at a public crossing, ¹⁸⁶ and the defendant was held liable. But the opinion of the court is based upon the principle that, the crossing being public, the defendant was apprised that it is attended with danger, and it was held that the character of the crossing imposed a duty upon the defendant in respect of persons using the crossing.

There is also a line of cases like *Railroad Co. v. Stout*, 17 Wall. 657, in which the owners of property have been held responsible for injury to children caused by dangerous machinery easily accessible and attractive to them. But these cases we think have no application here, for, according to the evidence, the boy was injured while attempting unlawfully to take the defendant's property.

And it will be found that most of the many cases cited by the appellee are similar to one or other of the four cases we have just referred to, none of which, as we have shown, sustain the contention of the appellee in this case. For here the injured person was not only a trespasser, but, perhaps without fully realizing it, was engaged in a criminal act when injured, and he had no right, therefore, to demand protection from the defendant.

In the case of *Frost v. Eastern R. R.*, 64 N. H. 221, 10 Am. St. Rep. 396, decided in 1886, in which it appears that a boy seven years old was injured while playing upon a turntable, it is said that "The turntable was required in operating the defendant's road. It was located on its own road, so far removed from the highway as not to interfere with the convenience and safety of the public travel, and it was not a trap set for the purpose of injuring trespassers." And the

same principles are announced by this court in the case of *Maenner v. Carroll*, 46 Md. 193, and in the more recent case of *Benson v. Baltimore Traction Co.*, 77 Md. 535; 39 Am. St. Rep. 436.

It follows that the judgment must be reversed.

Judgment reversed.

TRESPASS—CHILDREN.—The owner of land is not required to provide against remote and improbable injuries to children trespassing thereon. But he is liable for injuries received by them while trespassing upon his private ground when it is known to him that they are accustomed to go upon it, and that, from the peculiar nature and exposed and open condition of something therein, which is attractive to children, he ought reasonably to anticipate such an injury to a child as that which actually occurs: *Brinkley Car Co. v. Cooper*, 60 Ark. 545; 46 Am. St. Rep. 216, and note.

DITCH v. WESTERN NAT. BANK OF BALTIMORE

[79 MARYLAND, 192.]

NEGOTIABLE INSTRUMENTS—TITLE OF BONA FIDE HOLDER WITHOUT NOTICE.

The title of a bona fide holder of a negotiable instrument without notice of any facts which would invalidate the title of the indorser from whom the holder obtained it, is good, and will be protected.

CHECKS—INDORSEMENT "FOR DEPOSIT," EFFECT OF—TITLE.—If one deposits a check payable to his order, indorsed "for deposit to the credit of" the payee, and which is credited to him by the bank as cash, and the bank indorses it "for deposit" to its own credit, and transfers it to another bank, which credits it bona fide as cash, and pays the former bank, which afterward assigns for the benefit of creditors, the title to the check is vested in the latter bank.

CHECKS—INDORSEMENT "FOR DEPOSIT"—EVIDENCE.—If one deposits a check indorsed "for deposit," his testimony that "he regarded all the checks deposited by him as having been deposited for collection" is incompetent in an action to recover the value of the check.

ACTION to recover the value of a certain check. The lower court determined that the property in the check passed from the depositors, Ditch & Brothers, and vested in J. J. Nicholson & Sons, and that the latter conferred a perfect title upon the Western National Bank, their transferee. Ditch & Brothers appealed, and the question was whether the bank had a valid legal title. The opinion and note of dissenting opinion fully state the facts.

Alfred D. Bernard and Richard Bernard, for the appellants.

Samuel D. Schmucker and George Whitelock, for the appellees.

²⁰¹ BRYAN, J. This case involves a question of considerable importance. Thomas J. Shryock & Co. drew their check for one hundred and eighty-seven dollars and fifty-five cents on the Third National Bank of Baltimore, payable to the order of John E. Reese. Reese indorsed it in these words: "Pay to the order of J. S. Ditch & Brother." The next indorsement was in these words: "For deposit to the credit of J. S. Ditch & Brother." Signed per T. F. Cassidy. It was admitted that Cassidy had due authority from Ditch & Brothers to make and sign this endorsement. ²⁰² Luther B. Ditch, a member of the firm of Ditch & Brothers, in person deposited this check, together with others, in the bank of J. J. Nicholson & Sons, and they at the same time entered a credit of cash to the amount of all of these checks in the deposit-book of Ditch & Brothers, and also in their own books. Ditch's testimony on this point is as follows: "That he handed his deposit to John R. Nicholson in person; that his firm kept another pass-book with Nicholson & Sons, in which accounts were left for collection, on which promissory notes only were entered; that when these promissory notes were paid credit was entered on the regular deposit-book. All checks, whether out of town or city checks, were entered on the regular deposit-book as cash; on a few occasions checks dated ahead were entered as cash. If necessary, or if they were short of funds, they checked immediately after the deposit was made. They made no special arrangement about checking on deposit. . . . That the paper left for collection, consisting of promissory notes, was not carried to the deposit-books until the collection had been made, but all checks were entered in the deposit-book when deposited as cash, as if they were so much currency, and they were at liberty to check against such deposits as soon as made, if they desired." Matthew Aiken, general book-keeper of Nicholson & Sons, testified: "That he knew J. S. Ditch & Brothers; that they had two accounts with his bank and a separate pass-book for each account—one a deposit account and the other an account for collection. The collections went to their credit when collected, and were then marked off their collection-book and credited on the deposit-book. The deposits made by Ditch & Brothers went to their credit on the books of Nicholson & Sons on the same day the deposit was made, and they were credited on the deposit-book of Ditch & Brothers at the time the deposit was made"; and also

"that the check in question forms a part of a credit of cash, nine hundred and twenty-nine dollars and seventy-five cents to Ditch & Brothers in their deposit-book with Nicholson & Sons, on January 14, 1892; and ²⁰³ that the amount of the credit was so entered on the deposit-book at the time the deposit was made, and was carried to their credit on the books of Nicholson & Sons"; and also, "that all checks deposited by Ditch & Brothers were entered on their deposit-book as cash, and subject to immediate withdrawal in currency or anything else." When Ditch deposited this check, it is evident that he did not wish to have the money for it paid into his hand: 1. Because if he had wished the money it would have been as easy to obtain it from the Third National Bank as to deposit the check; and 2. Because, according to his own testimony and Aiken's, he could have drawn the money immediately if he had chosen to do so. Instead of the money he preferred a credit with Nicholson & Sons subject to his check; this was in all respects more convenient to him than the possession in hand of currency or coin. And this is what the indorsement plainly meant; the check was to be deposited and the amount of it was to be placed to the credit of Ditch & Brothers. The indorsement was in blank so far as the name of the indorsee is concerned; but when Ditch handed the check to Nicholson & Sons with the book in which his deposits were entered as cash, he evidently intended that the deposit should be entered in that book, and that he should receive credit for the amount of the check as cash, and that Nicholson & Sons should be the holders of the check as indorsee in blank. No form of words could have made his meaning plainer. And this meaning is in exact accordance with the indorsement. The indorsement showed that it was to be deposited in a banking-house, and that Ditch & Brothers were to receive credit for it; but the name of the banking-house was not mentioned; it was left blank. By delivery Ditch designated the bankers with whom it was to be deposited, and who was to give the credit. If Nicholson & Sons had paid to Ditch & Brothers the full amount of the check in coin or currency when it was delivered to them, it is supposed that there would have been no question about ²⁰⁴ the nature and effect of the transaction. But they gave Ditch & Brothers what was preferred to the coin or currency; they gave them the unconditional right to get the coin or

currency at any time they might see fit to call for it; thus relieving them from the trouble and risk attending the care and custody of it. Now, it is extremely difficult to see on what principle or by what process Ditch & Brothers could retain any interest in this check after they had delivered it to a blank indorsee and had received full and valuable consideration for it. It will not be alleged by any one that the banker did not give a consideration, valuable in the eye of the law, and sufficient to maintain the transfer of the check, when he made an absolute and unconditional contract with the depositor to pay his checks to the amount of the deposit. This point was decided in *Tyson v. Western Nat. Bank*, 77 Md. 412. It has been asked what would be the condition of the bank in case this check should be dishonored when presented for payment. The answer is not difficult. In *Tyson v. Western Nat. Bank*, 77 Md. 412, the court thought that the bank would have against the depositor the ordinary remedies which belong to the indorsee of dishonored instruments of this character. It could certainly recover from him the amount of the check. And here we may notice a portion of the testimony which has been made the subject of a good deal of comment. Aiken testified as follows: "It was not the custom of Nicholson & Sons to charge back to the depositors the checks which had been deposited with them and were dishonored. The custom was to have returned the checks to the party and to get the money refunded." John Ditch testified: "Should any check be returned they [Ditch & Brother] had always to make them good; that the Nicholsons never bothered themselves about the unpaid checks." This testimony merely shows that the bank was aware of its legal rights, and that depositors paid voluntarily what they could have been compelled to pay by suit at ²⁰⁵ law. Persons engaged in mercantile pursuits would lose all commercial credit and standing if they did not promptly perform their plain and well-understood obligations.

In *Tyson v. Western Nat. Bank*, 77 Md. 412, the draft deposited was indorsed in these words: "For collection for account of Tyson and Rawls, Greenville, N. C." This court held that this indorsement was not adequate to pass to the holders the title to the draft, and that the evidence in the case did not show any other way by which it could have been passed. The court also held that it was the clear understanding between the parties that Tyson and Rawls (the

depositors) should not obtain an absolute and unconditional credit in consequence of the deposit. It being our opinion that Nicholson & Sons acquired title to this check, we must declare our carefully considered judgment. If other tribunals, for whose learning and ability we entertain the greatest respect, have arrived at conclusions different from our own, we do not feel called upon to abandon the deliberate convictions which we entertain. But we do not assume that there is a great contrariety in the opinions of the courts on this question. A great many cases have been brought to judgment; but their facts have been diversified in great variety. It has always been held that the bank and the depositor could make their own contracts. Sometimes they have been made in express terms, and sometimes they have been inferred from the acts and conduct of the parties, and the regular and established course of dealing between them: It can readily be seen how broad a field of inquiry has been spread out before the courts, and what diversities of facts and combinations of facts would probably be presented for their consideration. Among the great number of cases which have been earnestly pressed upon us, we will cite three in which the effect of an indorsement "for deposit" was considered. The first is *National Commercial Bank v. Miller*, 77 Ala. 168; 54 Am. Rep. 50. In this case the bank brought an action against Proskauer, and sued ²⁰⁶ out a garnishment, which was served on Miller & Co., private bankers, who were alleged to be debtors of Proskauer. We will state the court's opinion in its own words: "The defendant, in the name of 'A. Proskauer & Co., agents,' opened, in January, 1883, a deposit account with the garnishees, who were bankers. On this account the defendant deposited checks payable to 'A. Proskauer & Co., agents,' which were entered in the pass-book, and drew checks, in the same name, 'on funds so deposited.' The check in question was indorsed 'For deposit, A. Proskauer & Co., agents.' The import and effect of such indorsement must be considered in the light of the attendant circumstances, and of the previous dealings between the parties. Where a depositor has for some time previously kept a deposit account with a banker, on which he was accustomed to deposit checks payable to him, entries of which were made in his pass-book, and to draw against such deposits, such an indorsement, in the absence of a different understanding, is presumptive of more than a mere agency or authority to col-

lect. The special purposes for which an indorsement for deposit is made, under such circumstances, may be readily inferred. It was a request and direction to the garnishees to deposit the sum to the credit of the defendant, and conferred on them not only authority to collect, but also authority to put the check in such form, and use it in such manner, as in their judgment and discretion, having reference to the condition and necessities of their business, would make it most available to their protection. The effect of the indorsement, for the consummation of this purpose, is to vest the garnishees with the title to and control of the check. If, in such case, the check is not paid, the banker depends for safety and indemnity on the liability of the drawer and the security of the indorsement." It appeared that Miller & Co., the garnishees, had presented the check for certification to the bank on which it was drawn, and that it ~~was~~ was certified by that bank in these words: "Good for eight thousand dollars." The court say that the certification made a new and distinct contract between the holder and the certifying bank, which thereby became the debtor of the holder, and that the drawer and indorser of the check were released from all liability on it, and that, as to them, it was paid. The significance of the certification was a question in the case; because, after it had been made, and after service of the garnishment, the defendant gave notice to Miller & Co., the garnishees, that he revoked their authority to collect it, and that they were forbidden to present it for payment. But, as it was already paid in legal effect to Miller & Co., they were the debtors of the defendant, and the notice was not efficacious to change the rights of the attaching creditor, or to displace the lien on the debt which he had acquired by service of the garnishment. We have mentioned the certification of the check, and its consequences, because these matters were zealously urged in the discussion of this case. But we do not see how they bear any analogy to the facts on which the rights of the parties in the present case depend. The other two cases were thought to be still more decisive. In one of them—*Freeman v. Exchange Bank*, 87 Ga. 45—the court used this language: "There being in evidence no facts extrinsic to the bill itself and its indorsements to throw light upon the question of title, we are not to be understood as holding that such facts might not exert a controlling influence on the question. Indeed, there is authority

for giving them such effect when duly proved. A deposit of paper in bank by a customer, he indorsing it "for deposit," may operate to clothe the bank with title under certain circumstances: *National Commercial Bank v. Miller*, 77 Ala. 168; 54 Am. Rep. 50." The other case is *Beal v. City of Somerville*, 50 Fed. Rep. 647. Checks were deposited in the Maverick National Bank by the treasurer of the city of Somerville; each ²⁰⁸ of them was indorsed "for deposit." The deposit was made about fifteen minutes before 3 o'clock in the afternoon; at 3 o'clock of the same day the bank closed its doors, and never opened them again for business. At the time of the deposit it was irretrievably insolvent. Beal was appointed its receiver, and a bill in equity was filed against him by the city of Somerville. In the bill the facts just mentioned were alleged, and also the following: "The treasurer had for several years made deposits with the bank without any special agreement in regard thereto. There was no agreement that checks deposited should be considered as cash, or that the treasurer could draw against them before collection. The treasurer never drew a check for which his deposit was not sufficient without counting the proceeds of uncollected checks, except in a few instances, on a few occasions, by special arrangement with the bank. There was no express understanding that the checks should be credited to the city immediately on deposit, but they were always so credited on the pass-book at the time of the deposit. . . . It was the practice of the Maverick and the other banks in Boston, in some cases, to allow depositors to draw against checks deposited before such checks were collected, and, in some cases, not depending upon the bank's opinion of the reliability of the depositor and the makers of the checks." A demurrer was filed admitting, of course, the facts stated. The court, in its opinion, said, among other things, Beal "fails to show that the city had an absolute right to check against the deposit as soon as made, irrevocable by notice from the bank; and that such right did not exist must be received by this court as a matter of judicial knowledge." The decree determined that the checks were the property of the city. We have not made these long citations for the purpose of criticising these decisions, nor for the purpose of inquiring whether they sustain or oppose the judgment which we ²⁰⁹ have formed in the case before us. Our object has been to show the great variety in the facts and details of cases which have

been adjudged, and to illustrate a sound juridical principle that differing facts may justly lead to differing conclusions of law.

John Ditch testified that "he regarded all the checks deposited by him as having been deposited for collection; otherwise why should they have to make good those which might be returned"? The legal character and attributes of the deposit depend upon the indorsement and upon what was said and done at the time the deposit was made, and upon the regular and uniform course of dealing between the parties. The testimony of the witness was his opinion on a question of law. An exception was filed to it, and it was undoubtedly incompetent. The check on the day it was received by Nicholson & Sons was indorsed by them "for deposit" and deposited in the Western Bank, where they kept an account. It was passed to their credit, subject to their check, and on the same day they largely overdrew their account. Later in the day they made an assignment for the benefit of their creditors, and it became known that they were totally insolvent. Although Nicholson & Sons acquired title to the check in the manner which we have stated, it is quite true that, in a controversy with their trustee, Ditch & Brothers might successfully impeach the transfer for fraud and set it aside. But the question with the Western Bank stands on different grounds. It is a bona fide holder of a negotiable instrument for value, without notice of any facts which would invalidate the title of the indorsers from whom they obtained it. All commercial principle and usage require that such a title should be protected.

At the request of Ditch & Brothers the payment of this check was stopped by the order of Shryock & Co., the drawers. Shryock & Co. filed a bill of interpleader in circuit court No. 2 of the city of Baltimore, and the court ²¹⁰ required the Western Bank and Ditch & Brothers to litigate between them their respective claims to the ownership of the check. The decree established the title of the Western Bank, and we affirm it.

Decree affirmed, with costs.

PAGE, J. I sat in the former argument of this case, and I have examined the briefs of counsel filed, and I wish to state that I concur in the opinion of the majority.

FOWLER, J., dissented. The check in controversy was dated January 13, 1892. Reese indorsed on that day, and on the following day Ditch & Brothers indorsed it, and deposited it in the bank of Nicholson & Sons. The latter at once indorsed the check "for deposit, J. J. Nicholson & Sons," and deposited it in the Western National Bank, and received credit for the amount of the deposit as cash. Within an hour or two after these deposits were made, Nicholson & Sons placed on record a deed of trust for the benefit of their creditors, and closed the doors of their bank. On the day of the failure, Ditch & Brothers heard of it, and immediately requested the drawer to stop payment. This was done, the check was protested, and the Western National Bank sued the makers. Upon a bill of interpleader filed by Shryock & Co., the Western National Bank and Ditch & Brothers were required to interplead—the former as plaintiff, and the latter as defendants. The bank filed its bill and the defendant answered it. The bank alleged substantially that Ditch & Brothers indorsed the check to the Nicholsons, and deposited it with them as cash, and received credit therefor in their account with the Nicholsons, and that the latter thereby became the owners of the check; and that the Nicholsons having indorsed the check to the Western National Bank "for deposit," and having deposited it with said bank and received credit for it as cash, and having drawn the funds represented by it, the bank became the bona fide holder thereof. Ditch & Brothers answered that they indorsed the check "for deposit to the credit of J. S. Ditch & Brothers" to enable the Nicholsons to collect the same in the usual course of business, and received that character of credit usual to receive when checks are deposited by a customer with a bank for collection; and denied that by such deposit for collection the Nicholsons thereby became the owners of said check, or that they had a right to indorse it to the Western National Bank or to any one. Upon the bill, answer, and testimony, it was decreed by the court below that the property in the check passed from Ditch & Brothers and vested in the Nicholsons, and that the latter conferred a perfect title upon the Western National Bank. Ditch & Brothers appealed from this decree, and the question was whether the Western National Bank had a valid legal title.

"The general question," said the dissenting judge, "of the relations between depositors and banks, as regards their respective rights in and title to negotiable paper deposited by the former with the latter, is much embarrassed by a conflict of authority. But after all, as we said in *Tyson v. Western Nat. Bank*, 77 Md. 412, the conflict is more apparent than real. It will be found that the views expressed by the highest tribunals in this country and England, when carefully examined, differ not so much in the principles announced as in the facts to which these general principles have been from time to time applied. In most of the cases in which it has been held that the title to negotiable paper passed to the bank from a depositor, such paper was indorsed in blank or made payable to the bank. After stating the general rule that when a customer deposits money to the credit of his account, the bank becomes debtor and he is creditor, we said in the case just cited: 'The consideration which a depositor receives for his money is the absolute and unconditional contract of the bank to pay his checks to the extent of his deposit. And the same rule obtains in the case of checks, . . . wherever under the circumstances of the case it is applicable; that is to say, wherever the bank becomes the owner of the commercial paper, and the customer acquires the unconditional right to draw for the proceeds. When a check . . . is indorsed in blank or to the order of the bank, and

the proceeds credited to the depositor as cash, the bank becomes the owner of the paper by virtue of the indorsement.' These quotations from such a recent case are sufficient to indicate our views in regard to the character of paper and the forms of indorsement there considered. But the indorsement in this case is neither an indorsement in blank nor to the bank. It is of a very different character from either, both in form and effect. Its terms are 'for deposit to the credit of J. S. Ditch & Bro.' It was contended by Ditch & Brothers that this is a restrictive indorsement, and by the Western Bank that it is partly restrictive and partly absolute—restrictive as to all the world except the Nicholsons, and as to them absolute as soon as it reached their hands.

"If such an indorsement as this can be held to pass title to commercial paper, it must be so either because such is the clear meaning of the words used, or because of some artificial or technical, but well-known and settled, meaning given to the language of the indorsement by the custom and usage of banks and their customers, which indicates a transfer of title was intended, though not expressed. Of course, it is not, and could not be, contended in this case that there is any such custom, for there is no evidence to sustain any such contention. What, then, is the fair and legal construction of this indorsement? In the first place we start with the presumption that the depositor does not intend to part with title to his paper, subject to be rebutted only by evidence of an express contract to the contrary, or of facts from which such contract must be inferred: 1 Daniell on Negotiable Instruments, sec. 340 c. We shall presently consider the effect of the credit given to Ditch & Brothers in anticipation of the collection of the proceeds of the check by the Nicholsons, but before doing so, we wish to ascertain the import of the language of the indorsement itself. It is apparent no words are used to indicate a transfer of title. On the contrary, it is conceded the indorsement here used is for the purpose of destroying negotiability in case of loss or miscarriage of the check. If that be its object, it is difficult to understand how such an indorsement, without something added thereto by special agreement, can be relied upon to establish title either in the Nicholsons or the Western Bank. The plain import of the indorsement would seem to be that the check was deposited for collection. What else could have been the object of the deposit? Certainly not for the purpose of getting an immediate credit, for it is in evidence that Ditch & Brothers not only had no agreement allowing them to draw on uncollected checks, but that, in point of fact, their deposited checks were always collected before they were actually drawn on, and were not considered cash until collected by the Nicholsons. In the case of *Beal v. City of Somerville*, 50 Fed. Rep. 647, decided on May 5, 1892, by the United States circuit court of appeals of the first circuit, a case strikingly like the one at bar, and in which the indorsement was, 'For deposit. John F. Cole, treasurer,' the following facts appear: Cole, the treasurer of the city of Somerville, indorsed the checks as above, and handed them to the receiving teller of the Maverick National Bank with a deposit ticket, and also his pass-book, and the teller at once credited therein and on the books of the bank the total amount of the checks. When the checks were received by the bank it was irretrievably insolvent, and closed its doors the same day of the deposit, at 3 o'clock. There was no agreement to allow the customer to draw at once on the proceeds of deposited checks. It was held, irrespective of the question of insolvency, that title to the checks so indorsed did not pass. 'The transaction,' say the court, Putnam, J., delivering the

opinion, 'was primarily a deposit of checks with, secondarily a duty to be performed concerning them by, the Maverick Bank.' After stating the general principle that a deposit of money creates the relation of debtor and creditor between the depositor and the bank, the opinion of the court continues: 'But with reference to the checks claimed by the city of Somerville, the word by which the transaction is ordinarily described may conveniently have, and therefore should have, its full natural force and meaning. A mere deposit would only require a bank to keep; but a usage requiring the Maverick Bank to do in this case something more has continued so long, and is so notorious and universal that the law can take judicial notice of it, and it happens that its terms and limitations cannot be mistaken. The bank must use due diligence to collect, and, as collections are completed, the bank no longer holds the avails as bailee, but is authorized to mingle them with its other funds, and thus constitute itself a debtor.' And again: 'Aside from the right of the bank to constitute itself a debtor from the time the checks are converted into cash or its equivalent, instead of a mere trustee or agent, no qualification of the strict legal relations created by a bailment is deducible from the general nature of the transaction, the terms in which it is expressed, or the settled custom, or is shown by the bank. The case just cited is one of much interest and importance, and the opinion of the court bears the impress of the most careful consideration and research.

"In *Freeman v. Exchange Bank*, 87 Ga. 45, an indorsement precisely like the one we are considering was held to be restrictive. The indorsement was, 'For deposit to the credit of S. A. Brown & Co.' The indorsers deposited the draft so indorsed in the National Bank of Kansas City, which bank, by its cashier, indorsed the draft 'Pay Exchange Bank, or order, for collection, account of National Bank of Kansas City.' The draft was paid to the Exchange Bank, where the money was attached as the property of S. A. Brown & Co. And it was so held. The supreme court of Georgia say: 'The agency created by the owners of this bill by means of this indorsement had not been fully executed. The Kansas City bank was still the immediate agent under them, and the Macon (that is, the Exchange) Bank was a sub-agent under it. The latter held the money as a bailee for the ultimate use and benefit of the owners.' Again, quoting from the same opinion: 'The maker of a restricted indorsement can follow the bill or its proceeds over any number of subsequent indorsements, the terms of his indorsement being notice of his title.' And, as we have said, it was held that notwithstanding the depositors, S. A. Brown & Co., had indorsed their paper, precisely as the paper in this case was indorsed, title did not pass, and the money attached in the hands of the Exchange Bank was condemned as the property of S. A. Brown & Co.

"It would too greatly prolong this opinion if we should examine the many cases in which various forms of indorsements have been held restrictive, and we shall only cite a few of them: 'Pay S. V. W., or order, for account of Miners' Nat. Bank of Georgetown': *White v. National Bank*, 102 U. S. 658. 'Pay to P., or, order only': *Power v. Finnie*, 4 Call, 411; 'Pay T. W., or order, for our use, value received on account': *Wilson v. Holmes*, 5 Mass. 543; 4 Am. Dec. 75. 'Pay to order of W. H. & Co., account First Nat. Bank of Chicago': *First Nat. Bank v. Reno County Bank*, 3 Fed. Rep. 257. 'Credit my account, J. B. S., cashier': *Lee v. Chillicothe Branch Bank*, 1 Bond, 387.

"We think, therefore, that looking at the indorsement itself, without regard to course of dealing between the parties, the language of the indorse-

ment cannot be held to transfer title to the check in question, but, on the contrary, must be held to be restrictive, at least, until the bank has performed its duty, and has collected the proceeds of the check. And this is the view very clearly expressed by Mr. Daniell in his work on Negotiable Instruments, even when the paper is so indorsed as prima facie to transfer title: as, for instance, in blank or to the order of the bank. He says that the collection of checks is generally attended with so little delay that banks are willing to treat them as cash deposits, and allow their customers to draw against them in anticipation of collection, reserving the right to charge back the paper to the customer if returned unpaid. 'Out of this practice,' says the author, 'has grown the erroneous idea that the bank, without more, becomes the owner of the deposited paper before collection, exemplified in *Metropolitan Nat. Bank v. Loyd*, 90 N. Y. 530.' 'Later cases,' continues the author, 'hold, and correctly as we conceive, that the checks deposited in bank by its customers do not at once become the property of the bank, but that it continues to be the agent of the customer until actual collection, the check in the mean time remaining the property of the depositor.'

"And in *Balbach v. Frelinghuysen*, 15 Fed. Rep. 675, one of the cases to which reference is made in the note to the section just cited, it was held that even when the check is indorsed to the bank and credit is given for it as cash on the customer's pass-book and the books of the bank, these facts are not conclusive evidence that title passes to the bank, for two reasons, say the court: 1. 'Because such credit was only conditional, and if the check should be dishonored, it would be charged back to the customer, which is inconsistent with ownership in the bank; and 2. Because this practice of banks to credit such deposits at once and to allow the depositor to draw against them is reckoned by the ablest text-writers as a mere gratuitous privilege': See, also, *St. Louis etc. Ry. Co. v. Johnston*, 133 U. S. 566. It would seem to follow that, whether we consider the indorsement alone or in connection with the credit given in this case to Ditch & Brothers by the Nicholsons, the result would be the same. For it is conceded here that no absolute credit was given, the Nicholsons always reserving to themselves the right to charge back or return unpaid paper.

"As between Ditch & Brothers and the Nicholsons, without regard to the restrictive character of the indorsement, no title to the check passed to the latter. No consideration was paid by them; and they were, and they knew they were, insolvent when the check was deposited. 'The acceptance of a deposit by a bank irretrievably insolvent constituted such a fraud as entitled the depositor to reclaim his draft, or the proceeds': Fuller, C. J., *St. Louis etc. Ry. Co. v. Johnston*, 133 U. S. 566.

"We have neither found nor been referred to any authority which sustains the contention of the appellee, unless the section in Morse on Banking, section 577, cited in the opinion of the learned judge below, can be so considered. But when this section is examined, and especially when it is ascertained that the sole authority (*National Commercial Bank v. Miller*, 77 Ala. 168; 54 Am. Rep. 50), which Mr. Morse cites to sustain it, does not seem to support the contention of the appellee, we may well hesitate before adopting the construction which it has placed upon Mr. Morse's language. It would seem more reasonable to construe this section (577) to mean that when a check is indorsed 'for deposit,' under the circumstances therein set forth, the bank may have the check certified, instead of actually collecting the money. And so the author says in the last clause of the section. In the case just cited, *National Commercial Bank v. Miller*, 77 Ala. 168, 54 Am.

Rep. 50, it was held that title passed to the bank for the consummation of the purpose for which the indorsement was made, that is to say, to enable the bank to deposit the proceeds to the credit of the indorser. It is nowhere said in that case that absolute title passed to the bank by virtue of the indorsement alone. But, on the contrary, the question under consideration was the effect of the indorsement, together with the certification of the check. And having determined that the bank by virtue of the indorsement had the right to have the check certified, and that when certified the check was, in contemplation of law, paid, the bank thereupon became the owner of the check, and was the debtor of the depositor. In other words, the indorsement 'for credit,' like the indorsement 'for collection,' gives the bank the right to collect the proceeds and credit them to the depositor, but in neither case can the bank appropriate to its own use paper so indorsed. Nor does the court in *National Commercial Bank v. Miller*, 77 Ala. 168, 54 Am. Rep. 50, intimate such a view. On the contrary, it held that the bank, 'by accepting a certification of the check made it their own, and the relation of debtor and creditor was created.' The indorsement 'for deposit' passed title for the purpose of certification, and the certification being, in contemplation of law, payment, the depositor's title to the check was transferred to the bank. Without adopting these views, we have referred to them for the purpose of showing that they do not seem to support the contention of the appellee, nor the construction it gives to section 577 of Morse on Banking.

"There is a wide distinction between *National Commercial Bank v. Miller*, 77 Ala. 168; 54 Am. Rep. 50, and the case under consideration. There the check was indorsed, deposited, and collected; but here there has been no collection—no payment of the check either in cash or its equivalent.

"If, however, the section (577) we have just referred to is to have the construction given to it by the appellee, there would be a striking conflict between it and section 584 of the same book, where it is said that 'when checks are deposited they are taken generally for collection by the bank as agent, and the bank does not owe the amount until the collection is accomplished. The bank may permit, as matter of favor, checks to be drawn before collection and payment, the depositor in the event of nonpayment being responsible for the sums so drawn, not by reason of his indorsement, the checks not having ceased to be his property, but for money paid': 2 Morse on Banking, sec. 584.

In Bolles on Bank Collections, edition of 1893, section 8c, the author cites the case of *City of Somerville v. Beal*, 49 Fed. Rep. 790, to sustain the view that an indorsement for 'deposit' with credit and conditional right to draw, transfers title; but this case was taken by appeal to the United States circuit court of appeals, and is reported in *Beal v. City of Somerville*, 50 Fed. Rep. 647. And in the court last named the contrary doctrine was held and ably maintained by an elaborate opinion, from which we have already quoted to show that such an indorsement is restrictive, and does not pass title. And in the case of *Metropolitan Nat. Bank v. Loyd*, 90 N. Y. 530, cited by the appellee to sustain its contention, the credit given by the bank to the depositor was an absolute one. 'Admitted circumstances,' say the court, 'show it was the intention of the parties to make the transfer absolute,' and 'the bank charged itself with a debt absolutely due to Murray,' the depositor. But here, as we have seen, there is not only no absolute credit, but 'the credit entry of cash was a mere delusion.' And as was said in *Beal v. City of Somerville*, 50 Fed. Rep. 647, if the appellee bank had shown that the de-

positor had a legal right to draw against the checks from the moment of the deposit, so absolute that the bank could not lawfully suspend it by notice or otherwise pending the collection, this would tend to support its position throughout. But, on the contrary, the provisional or mere pretense of a credit, such as shown in this case, is inconsistent with the notion of ownership of the check in the bank.

"If, however, the check in question had been indorsed in blank, or to the order of the Nicholsons, a very different question would have been presented. Then the legal effect of such indorsement to pass title to bona fide holders for value, according to the settled rules of commercial law, and the rights of innocent third parties, if any had intervened, would be properly considered, as was done in *Metropolitan Nat. Bank v. Loyd*, 90 N. Y. 530, and in many other cases since. 'The views of the supreme court of the United States,' says Mr. Daniell (1 Daniell on Negotiable Instruments, sec. 340), 'seem to embody the true logic of the question.' 'The bank transmitting the paper indorsed in blank is ostensibly the owner. It has been agreed by implied contract arising from usage that the avails shall be applied to balances against it. With this understanding its correspondent undertakes the collection and applies the avails. And then when the contract has been executed it would seem to be in contravention of the universally recognized principle which controls the negotiation of commercial paper to permit a third party who had declared by his indorsement that he had parted with his title to come in and assert it.'" The same view is expressed by us in *Tyson v. Western Nat. Bank*, 77 Md. 412, and constitutes what Putnam, J., in *Beal v. City of Somerville*, 50 Fed. Rep. 647, calls the doctrine of 'reputed ownership,' which he says is recognized by the supreme court of the United States in *St. Louis etc. Ry. Co. v. Johnston*, 133 U. S. 566. If, therefore, the depositor does not intend to pass title, he should not use the forms of indorsement which are universally used for that purpose, but should adopt some other form, such as 'for collection,' which we held in *Tyson v. Western Nat. Bank*, 77 Md. 412, does not, without more, pass title, or 'for deposit to credit of,' which we think, as used in this case, is equally restrictive.

"Of course, if the depositor is awarded even the gratuitous privilege of drawing in anticipation of collection, and he should avail himself of that privilege, then, without regard to the form of his indorsement, he should not be allowed to claim the proceeds of any deposited check. With the proceeds in his pocket he would be estopped. But, as we have seen, that is not this case.

"It has been suggested it was against public policy and contrary to the interests of commerce to hold this indorsement to be restrictive. But we do not think so. On the contrary, in our opinion it would be for the best interests of the public, the banks, and commerce if all indorsements except those which are in full or in blank should be declared restrictive. And such was the opinion of Lord Tenterden in the case of *Sigourney v. Lloyd*, 6 Barn. & C. 622. In the case just cited the indorsement was 'Pay to Williams or his order for my use.' 'I cannot see,' says Lord Tenterden, 'that the interests of commerce will be prejudiced by our holding that such an indorsement is restrictive. On the contrary, I think the interests of commerce will be thereby advanced.' When this case was taken up on appeal, Lord Chief Justice Best said: 'No inconvenience can possibly arise to the commercial interests of the country by limiting the operation of an indorsement so expressed. The only effect will be to make persons more cautious

in transactions of this nature in the future. Unless the words "for my use" have no meaning, it is obvious, upon looking at the indorsement, that inquiry was necessary to have been made, and if a meaning can be found for those words, the court must apply them so as to meet the object and intention of the indorser: *Lloyd v. Sigourney*, 3 Moore & P. 229.

"The commercial world is well acquainted with the forms of indorsement universally used to transfer paper, and when these forms are not used the owner of the paper ought not to be deprived of his interest therein by any course of reasoning, however ingenious it may be.

"Our conclusion is that the legal effect of this indorsement was to give notice to the Western National Bank that J. S. Ditch & Brothers were the owners of the check, and that the Nicholsons were only agents to collect the proceeds of the same and deposit them to the credit of J. S. Ditch & Brothers."

Effect of Check Indorsed "for Deposit."

It is held in *National Gold Bank v. McDonald*, 51 Cal. 64, 21 Am. Rep. 697, that if checks on another bank are handed by a depositor to the receiving teller of a bank, and are by the teller credited on the depositor's pass-book, they are received only for collection, and if not paid on presentation, may be returned and the credit in the pass-book canceled. Furthermore that if a customer of a bank hands the receiving teller a check drawn by another person upon the same bank, and at the same time hands him his pass-book, and the teller receives the check and enters a credit for the amount in the pass-book, but no entry is made on the books of the bank, and nothing else is said or done, and the drawer has no funds in the bank, the check may be returned to the depositor and the credit in the pass-book canceled; and that a finding by the court, in such a case, that the check was received as a cash deposit is erroneous. But, whether a check was deposited with a banker as money or for collection is a question of fact: *Strong v. King*, 35 Ill. 1; 85 Am. Dec. 336; *City of Somerville v. Beal*, 49 Fed. Rep. 790; affirmed in *Beal v. City of Somerville*, 50 Fed. Rep. 647. And evidence from which the jury might infer that it was received as cash should be submitted to them: *Titus v. Mechanics' Nat. Bank*, 35 N. J. L. 588. "When a check on itself," says Mr. Justice Swayne, in *National Bank v. Burkhardt*, 100 U. S. 686, 689, "is offered to a bank as a deposit, the bank has the option to accept or reject it, or to receive it upon such conditions as may be agreed upon. If it be rejected there is no room for any doubt or question between the parties. If, on the other hand, the check is offered and received as a deposit, there being no fraud and the check genuine, the parties are no less bound and concluded than in the former case. Neither can disavow or repudiate what has been done. The case is simply one of an executed contract. There are the requisite parties, the requisite consideration, and the requisite concurrence and assent of the minds of those concerned." If a check is offered and received as a deposit it is a deposit, and it follows, as a matter of law, that the bank is bound accordingly. Whether there was or was not a consummated deposit is the ultimate fact to be found by the jury: *National Bank v. Burkhardt*, 100 U. S. 686. The law, therefore, is that checks, drafts, or other evidences of debt received by a bank in good faith as deposits, and credited as so much money, become the property of the bank, and it becomes legally liable to the depositor as for so much money deposited as of the date of the credit: *City of Somer-*

ville v. Beal, 49 Fed. Rep. 790; affirmed on appeal in *Beal v. City of Somerville*, 50 Fed. Rep. 647; *Wasson v. Lamb*, 120 Ind. 514; 16 Am. St. Rep. 342; *Metropolitan Nat. Bank v. Loyd*, 90 N. Y. 530; *Cragie v. Hadley*, 99 N. Y. 131; 52 Am. Rep. 9; *Oddie v. National City Bank*, 45 N. Y. 735; 6 Am. Rep. 160; *City Nat. Bank v. Burns*, 68 Ala. 267; 44 Am. Rep. 138; *National Bank v. Burkhardt*, 100 U. S. 686; *St. Louis etc. Ry. Co. v. Johnston*, 27 Fed. Rep. 243; *American Exchange Nat. Bank v. Gregg*, 138 Ill. 596; 32 Am. St. Rep. 171; *In re State Bank*, 56 Minn. 119; 45 Am. St. Rep. 454; *Kavanaugh v. Bank*, 59 Mo. App. 540; *Midland Nat. Bank v. Roll*, 60 Mo. App. 585; *Hoffman v. First Nat. Bank*, 46 N. J. L. 604; *Security Bank v. Northwestern Fuel Co.* (Minn.), decided July 10, 1894; *Bolton v. Richard*, 6 T. R. 139. And our understanding is that this rule is not confined to cases where checks are drawn upon the same bank which credits them as cash, but that a bank which receives and credits as cash checks drawn upon some other bank is entitled to the same rights and incurs the same liability as if the checks were drawn upon itself and so credited: *City of Somerville v. Beal*, 49 Fed. Rep. 790; affirmed in *Beal v. City of Somerville*, 50 Fed. Rep. 647; *Titus v. Mechanics' Nat. Bank*, 35 N. J. L. 588; *St. Louis etc. Ry. Co. v. Johnston*, 27 Fed. Rep. 243; *Metropolitan Nat. Bank v. Loyd*, 90 N. Y. 530; *In re State Bank*, 56 Minn. 119; 45 Am. St. Rep. 454; *Hoffman v. First Nat. Bank*, 46 N. J. L. 604; *Midland Nat. Bank v. Roll*, 60 Mo. App. 585. The transaction is, in legal effect, a transfer to the bank upon an implied contract on the part of the latter to repay the amount of the deposit upon the checks of the depositor. The bank acquires title to the checks, drafts, etc., on an implied agreement to pay an equivalent consideration when called upon by the depositor in the usual course of business: *Cragie v. Hadley*, 99 N. Y. 131; 52 Am. Rep. 9. The transaction is conclusive and executed between the parties, and this whether the books of the bank are correctly kept or not, as the obligation of a bank to pay a check drawn upon it, or its right to refuse payment thereof, depends upon the actual state of the drawer's bank account at the time of its presentment, and not upon what the bank-books may then show: *American Exchange Nat. Bank v. Gregg*, 138 Ill. 596; 32 Am. St. Rep. 171. A bank receiving a check indorsed in blank from its customer, and giving him credit on its books for so much money deposited, becomes a purchaser, and the title to the check vests in it, and it becomes the debtor of the purchaser: *Kavanaugh v. Farmers' Bank*, 59 Mo. App. 540; and where a bank receives a check and gives credit therefor, subject to check, and on its nonpayment charges it back to the depositor, it does not necessarily revert title in the depositor, especially where the evidence shows that such was not the intention: *Midland Nat. Bank v. Roll*, 60 Mo. App. 585. As a check deposited by general indorsement of the payee, and passed to his credit on the books of a bank, becomes the property of such bank, it may legally be transferred to a bona fide creditor: *Hoffman v. First Nat. Bank*, 46 N. J. L. 604. Crediting a check deposited as cash constitutes a payment of it, and the amount of it cannot be withheld by the bank on discovering that the check is an unauthorized overdraft, and that the drawer is insolvent: *City Nat. Bank v. Burns*, 68 Ala. 267; 44 Am. Rep. 138. On the other hand, if bills or drafts are deposited and entered in the customer's account as cash, with his knowledge and consent, so that he becomes entitled to draw against the amount, he will thereby be precluded from claiming the bills or drafts from either the bank or its receiver: *Wasson v. Lamb*, 120 Ind. 514; 16 Am. St. Rep. 342; *St. Louis etc. Ry. Co. v. Johnston*, 27 Fed. Rep. 243. If the owner of a check delivers it to a bank which accepts it, and credits him for the

amount on his pass-book which he accepts, the property in the check vests in the bank, although no express agreement was made transferring the check as so much money, and an indorsee of the check may recover of the drawer, notwithstanding stoppage of payment; and evidence, in such an action, of the bank's knowledge of its insolvency when it received the check is inadmissible where the answer, claiming that no title passed to the bank, contains no allegations that the bank practiced a fraud upon the depositor by receiving the check in contemplation of insolvency: *Metropolitan Nat. Bank v. Loyd*, 90 N. Y. 530. If the amount of a check is credited to the holder upon his deposit ticket by the officers of a bank, the latter becomes liable, although on the same day, and before the close of banking hours, it finds that the account of the drawer was overdrawn at the time of the deposit, and returns the check to the depositor as not good: *Oddie v. National City Bank*, 45 N. Y. 735; 6 Am. Rep. 169. A bank, however, which receives on deposit from a customer a check which it credits as such, and not as cash, is not liable for the check as a purchaser where there is no intention of the parties that title shall pass to the bank as absolute owner: *Bailie v. Augusta Sav. Bank* (Ga.), decided January 14, 1895. It must be observed, however, that the fact alone of giving credit for a check as cash does not pass title. The question as to whether the check becomes the property of the bank is really one of agreement between the parties, as we have seen above, and all the facts of the transaction must be considered. Neither an unrestricted indorsement of the paper by the customer, nor crediting him with the amount of the check on his account, with the privilege of drawing against it, is conclusive on the question of ownership. If it is, in fact, delivered to the bank for collection, or for "collection and credit," a credit to the customer before collection will be deemed merely provisional, which the bank may cancel if the paper is not paid: *In re State Bank*, 56 Minn. 119; 45 Am. St. Rep. 454. If, however, the depositor draws, or is entitled to draw, against such a deposit as cash, it works a transfer of title: *Ayres v. Farmers' etc. Bank*, 79 Mo. 421; 49 Am. Rep. 235. In banking transactions very little is said, but very much is understood; and in determining the legal effect of depositing checks we must apply the same rules applicable to all contracts and business affairs, and effectuate and carry out the intention of the parties to be gathered from their acts and declarations, and the accustomed and understood course of the particular business: *American Exchange Nat. Bank v. Gregg*, 138 Ill. 596; 32 Am. St. Rep. 171. Any attempt to distinguish between a credit in the bank-book of a customer and an actual cash payment is "as impolitic on the part of the bank" as it is "unjust toward the individual" who accepts the credit, instead of his money; and payment may be made by a check deposited and received as money: *Levy v. Bank of United States*, 4 Dall. 234; *Pratt v. Foote*, 9 N. Y. 463; *Strong v. King*, 35 Ill. 1; 85 Am. Dec. 336. Where a customer has a deposit account with bankers, on which he is accustomed to deposit checks payable to himself, which are entered on his pass-book, and to draw against such deposits, an indorsement of the words "for deposit" on a check so deposited is, in the absence of a different understanding, presumptive of more than a mere agency or authority to collect. It is a request and direction to deposit the sum to the credit of the customer, and gives the bankers authority not only to collect, but to use the check in such manner as, in their judgment and discretion, having reference to the condition and necessities of their business, may make it most available to

their protection; and they may have it certified by the bank on which it is drawn: *National Commercial Bank v. Miller*, 77 Ala. 168; 54 Am. Rep. 50.

NEGOTIABLE INSTRUMENTS, TITLE TO.—A bona fide purchaser of a negotiable instrument for value before maturity, without notice or knowledge of defects, acquires title thereto as against the world: *First Nat. Bank v. Slaughter*, 98 Ala. 602; 39 Am. St. Rep. 88, and note; *Richards v. Monroe*, 85 Iowa, 359; 39 Am. St. Rep. 301, and note.

EVIDENCE—NEGOTIABLE INSTRUMENTS.—Parol evidence is inadmissible to contradict or vary the indorsement on a negotiable instrument: *Youngberg v. Nelson*, 51 Minn. 172; 38 Am. St. Rep. 497, and collected cases in note thereto.

NORFOLK AND WESTERN R. R. Co. v. HOOVER.

[79 MARYLAND, 262.]

MASTER AND SERVANT—INJURY TO FELLOW-SERVANT—WHAT NECESSARY TO MAKE MASTER LIABLE.—If a servant sues his master for injuries resulting from the negligence of a fellow-servant, he must, to recover, prove that some negligence of the latter caused the injury, and that the master was negligent either in the selection of the fellow-servant or in retaining him.

MASTER AND SERVANT—SELECTION OF SERVANTS—MASTER'S DUTY AND LIABILITY.—A master owes to each of his servants the duty of using reasonable care and caution in the selection of competent fellow-servants, and in retaining only those who are. If he fails to perform this duty, and an injury is occasioned by the negligence of an incompetent or careless servant, the master is responsible to the injured employee, not for the mere negligent act or omission of the incompetent or careless servant, but for his own negligence in not discharging his own duty toward the injured servant.

MASTER AND SERVANT—NEGLIGENCE IN SELECTION OF SERVANT, HOW SHOWN.—A failure to use due care in selecting careful servants may be fixed upon the master by showing such notorious or general reputation respecting the servant's unfitness or incompetency as that the master could not, without negligence on his part, have been ignorant of it when he employed the servant. Hence, a railroad company's negligence in employing a drunken brakeman whereby an engineer was injured may be shown by proof of the brakeman's general reputation for intemperance for one or two years before the accident and following it.

MASTER AND SERVANT—NEGLIGENCE IN SELECTION OF SERVANT—EVIDENCE OF SERVANT'S GENERAL REPUTATION FOR INTEMPERANCE.—Upon the question of a railroad company's negligence in employing and retaining a drunken brakeman, whereby an engineer was injured, it is competent to show that the general reputation of the brakeman for intemperance was of such a notorious character that the jury might well infer that it was known to the company, or that it was negligent in not making proper inquiry.

MASTER AND SERVANT—FELLOW-SERVANTS, WHO ARE—RECOVERY FOR ACT OF INCOMPETENT FELLOW-SERVANT.—Persons engaged in the same common work, employed by the same agent of the common master, and performing duties pertaining to the same general business, are fellow-

servants. Hence, a brakeman, engineers, and firemen, and a train dispatcher, employed by the division superintendent of a railroad, and being under his instructions, are fellow-servants; and, if the negligence of the train dispatcher in sending out a drunken brakeman causes injury to an engineer, the latter cannot recover until he shows that there was negligence in the selection of the train dispatcher.

MASTER AND SERVANT—INJURY TO FELLOW-SERVANT—CONCURRING NEGLIGENCE—INSTRUCTIONS.—To justify a recovery by a servant against a master for injuries received through the negligence of a fellow-servant, the negligence of the fellow-servant and the additional negligence of the master in employing that particular servant whose negligence caused the injury must concur; and instructions to the jury concerning the master's negligence in selecting the plaintiff's fellow-servants should clearly restrict it to the selection of the one who caused the injury.

PLEADING—ADMISSION OF FACT OF INCORPORATION.—If the incorporation of the defendant averred in the declaration is not denied by the plea, that fact must be taken as admitted.

APPEAL—OBJECTION THAT CANNOT BE CONSIDERED.—That there is no evidence to support the hypothesis of a prayer for instructions is an objection that cannot be considered on appeal, unless there appears in the record a special exception based upon that objection, signed and sealed by the judge.

Hy. Kyd Douglas, for the appellant.

M. L. Keedy and W. C. Griffith, for the appellee.

260 **McSHERRY, J.** This is an action brought to recover damages for personal injuries received by the appellee, an employee of the Norfolk and Western Railroad Company, as the result of alleged negligence on the part of his fellow-servants. The verdict and judgment were in his favor, and the company has appealed. In the record there are three bills of exception upon which the questions to be considered arise. Two of these exceptions were reserved by the appellant and one by the appellee.

It appears that in May, 1891, an extra train of loaded freight cars was started from Shenandoah, Virginia, about 11:30 P. M., to run through to Hagerstown, Maryland. The crew consisted of a conductor, an engineman, a fireman, a flagman, and two brakemen. Hoover, the appellee, was the engineman. As the train proceeded northward, it descended some heavy grades, and the engineman noticed that its speed was not kept under proper control by the brakemen. At Luray the train laid over for an hour, and the engineman requested the brakemen not to let him down the hills so rapidly, as the night was quite foggy. After leaving Luray they ascended the grade to Vaughn's Summit, turning that point

at a speed of about ten miles an hour. Immediately upon passing the summit the appellee shut off the steam, so that the train might descend by gravity alone, without aid from the engine. When about a train's length over the hill he discovered that the train was increasing its speed, and he applied the tank brake; but this producing no effect, he blew for brakes, turned on the driver brakes, and applied sand to the track. ²⁶¹ This not checking the train, he again blew for brakes, and reversed his engine. He repeated his signal for brakes at least once, and probably twice, afterward, but they seem not to have been heeded by the brakemen, for the train moved rapidly onward down the grade. The packing blew out of the cylinder, and this caused the train to plunge forward, throwing the appellee back into the tender. At this juncture, as they were rapidly approaching and were only some ten or twelve car-lengths distant from Possum Hollow, which is crossed upon a trestle seventy-five or eighty feet high, the appellee saw that a collision with another freight train standing, or moving very slowly northward, on the trestle, was imminent and unavoidable; and, to save himself, jumped from his engine, and received the injuries for which he has brought the pending suit. There was evidence offered tending to prove that Huyett, one of the brakemen, had been drinking that night before the accident happened, and within thirty minutes prior to the collision his breath gave unmistakable evidence of it. In this state of the proof a witness was asked whether he knew the general reputation of Huyett and Reese, the two brakemen, for sobriety for one or two years before the accident, and following that; and if so, to state what that reputation was. To this question and the evidence sought to be elicited thereby the appellant objected, but the court permitted the question to be asked and answered, and this ruling forms the subject of the first exception.

It has been repeatedly held by this court, and is the settled and established doctrine of Maryland, that in actions of this character, where a servant sues his master for injuries resulting from the negligence of a fellow-servant, the plaintiff, to succeed, must prove, not only that some negligence of the fellow-servant caused the injury, but also that the master had himself been guilty of negligence, either in the selection of the negligent fellow-servant in the first instance, or in retaining him in his service afterward. ²⁶² Mere negligence

on the part of the fellow-servant, though resulting in an injury, will not suffice to support the action, because the master does not insure one employee against the carelessness of another. But he owes to each of his servants the duty of using reasonable care and caution in the selection of competent fellow-servants, and in the retention in his service of none but those who are. If he does not perform this duty, and an injury is occasioned by the negligence of an incompetent or careless servant, the master is responsible to the injured employee, not for the mere negligent act or omission of the incompetent or careless servant, but for his own negligence in not discharging his own duty toward the injured servant. As this negligence of the master must be proved, it may be proved like any other fact, either by direct evidence or by the proof of circumstances from which its existence may, as a conclusion of fact, be fairly and reasonably inferred. That drunkenness on the part of a railroad employee renders him an incompetent servant will scarcely be disputed; nor can it be questioned that a master who knowingly employs such a servant, or who, knowing his habits, retains him in his service, would be guilty of a reckless and wanton breach of duty, not only to the public, but to every employee in his service. There is no evidence in the record, nor has there been a suggestion, that either the conductor, fireman, or flagman of the train was negligent or incompetent. The negligence which directly caused the accident is attributed solely to the brakemen; and the appellant's negligence, which, as it is claimed, fixes its liability, lies in its employment of, or continuing to retain in its service, these dissipated or intemperate brakemen. But, as we have stated, it was necessary for the plaintiff to show not only their employment, but that the company had not used due and ordinary care in selecting them. There was no direct evidence adduced to show the absence of such care; but the question excepted to, and the evidence elicited in response ²⁶³ to it, were designed to show by indirect or circumstantial evidence that the company had not used the degree of care and caution in the selection of these brakemen that its duty imperatively required it to use. So the question is, Can you fix upon the master a failure to use due care in selecting careful servants by showing such notorious or general reputation respecting the servant's unfitness or incompetency as that the master could not, without negligence on his part,

have been ignorant of it when he employed the servant? About this there ought to be no difficulty. If the servant's general reputation before employment is so notorious as to unfitness as that it must have been known to the master but for his, the master's, negligence in not informing himself—if he could have been ignorant of it only because he failed to make investigation—then, it is obvious that he has not used the care and caution which the law demands of him in selecting his employees. Hence, "the servant's general reputation for unfitness may be sufficient to overcome the presumption that the master used due care in his selection, even though actual knowledge of such reputation for unfitness on the master's part is not shown": Wood on Master and Servant, sec. 420. In *Davis v. Detroit etc. R. R. Co.*, 20 Mich. 124, 4 Am. Rep. 364, Cooley, J., speaking for the court, adopts the case of *Gilman v. Eastern R. R. Corp.*, 10 Allen, 233, 87 Am. Dec. 635, which puts upon the employer the responsibility of negligently employing an unfit person, generally known and reputed to be such, notwithstanding the employer may in fact have been ignorant of such unfitness. Continuing, he said: "The ignorance itself is negligence in a case in which any proper inquiry would have obtained the necessary information, and where the duty to inquire was plainly imperative." So in *Hilts v. Chicago etc. Ry. Co.*, 55 Mich. 437, where a track hand was killed by an engine backing rapidly along a switch, and the engineman was drunk, the court said: "When, however, ³⁶⁴ as in this case, it is shown that the accident occurred through the negligent act of the servant, who was in an intoxicated condition, and when it was shown further that he was in the habit of drinking intoxicating liquors to excess, and such habit had extended over a period of nine months while in defendant's employ, and no actual knowledge or notice ever reached any superior officer of the engineer, we think the jury may be justified in concluding from such evidence that the defendant was negligent in failing to learn such habit, and in retaining the engineer in its employment." See, also, *Gilman v. Eastern R. R. Co.*, 18 Allen, 433; 87 Am. Dec. 635; *Wright v. New York Cent. R. R. Co.*, 25 N. Y. 566; *Chicago etc. R. R. Co. v. Sullivan*, 63 Ill. 293; *Chapman v. Erie Ry. Co.*, 55 N. Y. 579.

The evidence offered and admitted had no relation to specific or isolated acts of negligence. These, unless brought home to the knowledge of the master, would not have been

admissible as reflecting on the question of the master's care: *Baltimore Elevator Co. v. Neal*, 65 Md. 438. We think, for the reasons we have given, and upon the authorities we have cited, there was no error committed in allowing the question excepted to in the first bill of exception to be put and answered.

Under this ruling quite a number of witnesses testified to Huyett's general reputation for intemperance, extending from a period long anterior to his employment by the appellant up to and after the accident. One witness, Eyler, gave evidence as to Reese's general reputation. With respect to Huyett, the evidence, if credited by the jury, showed a general reputation covering many years uninterruptedly, and of such a notorious character that a jury might well have inferred it was known to the master when Huyett was employed, or else that the master failed to know it only because of neglecting to make proper inquiry. There was, consequently, evidence legally sufficient to go ²⁶⁵ to the jury upon the subject of the company's negligence; and, therefore, there was no error in rejecting the appellant's first and fifth prayers, which sought to take the case from the consideration of the jury; nor in rejecting its fourth prayer, which sought to exclude this evidence from the case.

There was error in rejecting the second prayer of the appellant. It asked the court to say to the jury that if the injury to the plaintiff was caused by the intoxication or negligence of the brakemen, or either of them; that the brakemen were employed by Shull, the train dispatcher, and were sent out by him on the train in question; and further that Shull was guilty of negligence in sending out these brakemen, or either of them, on the train, "yet the jury are further instructed that Shull and the plaintiff were coemployees of the defendant in the sending out of said brakemen, and the defendant is not responsible to the plaintiff for the neglect or want of care of the said Shull, unless they shall further find that there was negligence on the part of the defendant in the employment of Shull, and there is no legally sufficient evidence in the cause from which the jury can so find." Now, whether Shull was a deputy master or vice-principal, or only a fellow-servant of the plaintiff, is a question of law to be determined by the court if the facts be undisputed or conceded: *Yates v. McCollough Iron Co.*, 69 Md. 382. Shull was a mere dispatcher of trains, with power to employ and dis-

charge flagmen and brakemen, and having general charge of the trainmen of the first division of the road and the movement of trains thereon. He was employed by the division superintendent, who had the general management of the division. The engineman and firemen are also under the instructions of the division superintendent. This is all the evidence (and it is entirely undisputed) to show that Shull was a vice-principal, and not a fellow-servant. In *Wonder v. Baltimore &c. R. R. Co.*, 32 Md. 418, 3 Am. Rep. 143, the general rule was laid down, that all who serve the same master, work under the same control, deriving authority and compensation from the same source, and are engaged in the same general business, though it may be in different grades and departments of it, are fellow-servants, each taking the risk of the other's negligence. In that case a brakeman who was injured whilst using a defective brake, was held to be a fellow-servant with the mechanics in the shops, the inspector of machinery and rolling stock, and the superintendent of the movement of trains. And so in *State v. Malster*, 57 Md. 287, it was held that a superintendent or manager is a fellow-servant within the rule which exonerates the master. In *Baltimore Elevator Co. v. Neal*, 65 Md. 438, the captain of a steam-tug owned by the company was held to be a fellow-servant of a laborer who was injured in the company's service. This court said in that case: "Nor is the liability of the master enlarged or made different by the fact that the servant who had suffered the injury occupied a grade in the common service inferior to that of the servant whose misconduct caused the injury complained of." And in *Yates v. McCollough Iron Co.*, 69 Md. 370, the authorities were all reviewed, and it was held that the chief manager of the carbon works, who hired and discharged the hands, kept their time, etc., was only a fellow-servant of a laborer who was injured whilst operating the machinery: *Mayor etc. of Baltimore v. War*, 77 Md. 593. In the face of these decisions it is impossible to treat Shull as anything more than a fellow-servant. The management of the division upon which he was train dispatcher was not committed to him. He was a subordinate appointed by the superintendent, and though he had charge of the trainmen and of the movement of trains on his division, and could employ and discharge flagmen and brakemen, it is far from being shown ²⁶⁷ that the master had relinquished all supervision of the work on

that division, and intrusted its direction, as well as the procuring of materials and machinery and other instrumentalities necessary for the service, to his judgment and discretion. The engineman and fireman were not employed by him, but by the division superintendent, and if the grade of his position was superior to that of the engineman, that fact did not make him a vice-principal as respects the latter. They were both engaged in the same common work, employed by the same agent of the common master, and were performing duties pertaining to the same general business; and, unless the whole current of the Maryland decisions is to be reversed, they were fellow-servants of the railroad company, upon the evidence now before us. If this be so, then, even if Shull had been negligent in sending out these brakemen, and if that negligence caused the injury sued for, still the plaintiff could not recover, unless the company had not used due care in the selection of Shull, and of this there was not a particle of evidence offered.

The appellant's sixth prayer was properly rejected. There was no necessity to prove that the company had been incorporated. That fact was averred in the declaration, and was not denied by the pleas, and, under section 108, article 75, of the code, must be taken to be admitted.

This brings us to the prayers presented by the appellee. Under a local law of Washington county (Code of Public Local Laws, art. 22, secs. 69, 70), we are required to consider the rejected prayers of the plaintiff if he has excepted; and this he has done. By the defendant's exception the plaintiff's granted prayers and the defendant's rejected prayers are brought before us. By the plaintiff's exception his rejected prayers as well as the defendant's granted ones are presented for review.

The court granted the plaintiff's first, seventh, and eighth prayers. We do not understand that the seventh and ~~seventh~~ eighth are seriously questioned. Without discussing them, we need only say they are not open to substantial objection.

The appellee's first prayer, however, ought not to have been granted. It was objected in the argument that there was no evidence to support some of the hypotheses it contained, but as no special exception based upon that objection and signed and sealed by the judge appears in the record, we are not at liberty to consider it: *Albert v. State*, 66 Md. 334; 59 Am. Rep. 159. The prayer, after setting forth the

facts, proceeds: "Then, if the said injury to the plaintiff was caused by the want of ordinary skill and experience, or other unfitness on the part of the other hands, or any of them, in charge of said train, to manage and conduct the same, by reason of the intemperate state or condition of either of them," the plaintiff using due diligence, "the plaintiff is entitled to recover, provided the jury further find from the evidence that the defendant did not use reasonable care in the selection and employment of the brakemen or other hands or employees engaged with the plaintiff in conducting said cars." That is to say, if the injury resulted from negligence caused by the intemperance of any of the train hands, the defendant would be liable, if it had failed to use due care in the selection of either of the employees on that train, even though that particular employee, thus carelessly selected, had been guilty of no negligence, and had in no way occasioned the accident. Consequently, if the jury thought the injury was caused by the drunkenness of the brakeman, and that the company had not used due care in the selection of the fireman, the company would be liable, notwithstanding the fact that the fireman had been guilty of no negligence, and had in no way produced or helped to produce the injury. Thus, the negligence of one servant and the independent negligence of the master in employing some other servant, who had no connection with the accident, established, under ~~see~~ this instruction, the plaintiff's right to recover. This is not the law. On the contrary, it is the negligence of a fellow-servant and the additional negligence of the master in employing that servant, whose negligence actually caused the injury which must concur before a plaintiff can recover in a case of this character. The instruction, therefore, announced an obviously erroneous proposition, and was calculated to mislead the jury, because there was evidence before them from which they might have inferred that due care had not been used in the selection of a fireman, though there was no evidence from which they could have found that the fireman was responsible for the accident. The instruction should have clearly restricted the negligence of the defendant in selecting the plaintiff's fellow-servants to the selection of such of them as by their incompetency, growing out of their intemperance, actually caused the injury.

The appellee's second, third, fourth, and fifth prayers were properly rejected. There was no legally sufficient evidence

adduced to support them on the several hypotheses assumed in them; and if they had been free from other objections, this one was sufficient to justify the court in refusing to grant them.

There remains the appellant's third prayer, which the court granted, but we think erroneously granted. It told the jury, in substance, that unless the brakeman, Huyett, was drunk at the time of the accident, and his negligence, by reason of such drunkenness, produced or contributed to the accident, the evidence of general reputation as to his intemperance was not relevant, and could not be considered by the jury, "*unless such reputation was brought home to the knowledge of the defendant before the accident,*" and there is no such evidence of such knowledge. Had the prayer omitted the words italicised it would have been correct, but those words super-added a condition which is manifestly inaccurate. Now, it is obvious that if Huyett ²⁷⁰ was not drunk and was not negligent when the accident happened, and therefore did not cause or contribute to it, the evidence of his general reputation for intemperance was wholly irrelevant, even though that reputation had been brought home to the knowledge of the appellant before the accident; because, if he did not occasion the injury by his negligence, the fact that the master had knowledge of his bad reputation would in no way have made the master liable for an injury not caused by Huyett at all. In other words, the master's knowledge of Huyett's bad reputation had nothing whatever to do with the case if Huyett did not cause or contribute to the accident; and if Huyett did, by his intemperance, cause the accident, then it was immaterial whether the master had knowledge of his bad reputation or not; because, as already stated, the master was negligent in not knowing it. So, in either view of the question, the prayer was wrong, because of the addition of the words indicated.

For the error in granting the appellee's first instruction and the appellant's third, and for the error in rejecting the appellant's second prayer, the judgment must be reversed, and a new trial will be ordered.

Judgment reversed, with costs above and below, and new trial awarded.

injuries sustained by one servant from the negligence of another, some sort of negligence on the part of the master, either in the employment or retention of the servant, must be shown. It cannot be presumed. The servant's general reputation for unfitness may be sufficient to overcome the presumption that the master used due care in his selection, even though actual knowledge of such reputation or unfitness on the master's part is not shown. It is the master's duty to exercise diligence and caution in the selection of his servants, and this duty is measured by the exigencies of the particular service. Evidence of general reputation is admissible to prove the unfitness of a fellow-servant, and ignorance of such general reputation on the part of the master may of itself, where it is his imperative duty to know the fitness of his servant, and when inquiry would have led to the knowledge, be such negligence as to charge the master with liability for injury to another servant, inflicted by such incompetent fellow-servant. In such cases the general reputation of the fellow-servant for incompetency, recklessness, or unskillfulness, or even of specific acts of negligence, is competent, as tending to show that the master, by the exercise of that ordinary and reasonable care required in his employment, could and ought to have known of his unfitness, want of skill, or reckless habits. In proving reputation, however, it is the general reputation only which may be shown: *Western Stone Co. v. Whalen*, 151 Ill. 472; 42 Am. St. Rep. 244, and note. A servant injured by the negligence of another servant must show by his complaint that some duty of the master to him has been violated in order to hold the latter liable: *New Pittsburgh etc. Coke Co. v. Peterson*, 136 Ind. 398; 43 Am. St. Rep. 327, and note.

MASTER AND SERVANT—FELLOW-SERVANTS.—Employees serving a common master, engaged in the same common pursuit, and in accomplishing the same common object, are fellow-servants: *New Pittsburgh etc. Coke Co. v. Peterson*, 136 Ind. 398; 43 Am. St. Rep. 327. All persons employed under one principal in the conduct of one enterprise, such as operating a railroad, are the servants of one master, and, therefore, fellow-servants of each other: *Jenkins v. Richmond etc. R. R. Co.*, 39 S. C. 507; 39 Am. St. Rep. 750, and note.

CORPORATIONS—ISSUE OF CORPORATE CAPACITY—HOW RAISED.—At law every fact alleged in the declaration and not denied in the plea is taken as true. Hence, if the defendant wishes to put plaintiff's corporate capacity in issue, he must do so by a specific denial: *Bank of Jamaica v. Jefferson*, 92 Tenn. 537; 36 Am. St. Rep. 100.

ANDERSON v. GILL

[79 MARYLAND, 312.]

CHECKS—TIME FOR PRESENTMENT—LOSS.—The holder of a check has until the close of banking hours on the next secular day in which to present it, where it is received in the same place as the bank on which it is drawn is located; and if the bank in the mean time fails, the loss will fall on the drawer.

CHECKS—ACCEPTANCE OF, AS PAYMENT—DILIGENCE IN PRESENTMENT.—The acceptance of a check implies an undertaking of due diligence in presenting it for payment, and if the party from whom it is received sustains loss by want of such diligence, it will be held to operate as actual payment.

CHECKS—CERTIFICATION OF, RELEASES DRAWER.—If the holder of a check causes it to be certified by the drawee, the drawer is discharged.

CHECKS—PRESENTMENT—DISHONOR OF SUBSTITUTED CHECK AND SUBSEQUENT DEMAND ON ORIGINAL PAYEE.—If the holder of a check chooses to present it for payment on the same day it is received, and takes a substituted check on another bank in lieu of cash, it amounts to payment, and if the drawee fails on that day, the payee cannot, after neglect to use the utmost diligence in presenting the substituted check for payment, put himself, by a subsequent demand upon the original drawee, in the same position he would have occupied had he not made the first demand.

A CHECK IS PAYABLE IN MONEY, and in nothing else.

CHECKS—PRESENTMENT FOR PAYMENT—REASONABLE TIME.—The rule allowing the holder of a check until the close of banking hours on the next secular day in which to present it for payment does not apply to a check given by the drawee to the payee of the original check, or his agent, upon its surrender.

CHECKS—DILIGENCE REQUIRED IN PRESENTMENT OF SUBSTITUTED CHECK.—No time is fixed in which the holder of a substituted check taken upon the surrender of the original check to the drawee thereof must present it for payment, in order to hold the original drawer. Each case must depend on its own peculiar facts, and diligence would sometimes require presentment to be made within the period which would ordinarily limit the drawee's liability, but in no case can it be extended beyond that period.

CHECKS—PRESENTMENT—QUESTION OF LAW.—If the facts are undisputed the question as to whether proper diligence has been exercised in presenting a check for payment is a question of law.

CHECKS—WHEN DRAWER IS DISCHARGED BY THE TAKING OF A SUBSTITUTED CHECK.—If the payee of a check drawn on a banker having funds of the drawer available to cash it presents it in due time through his collecting agent, and the latter, instead of receiving money for it, surrenders it and takes in lieu of the money the drawee's own check upon another bank having funds with which to pay the substituted check, and then fails to use the utmost diligence in presenting the substituted check for payment, which, when it is presented, is not paid, because of the supervening insolvency and suspension of the drawer of the substituted check, the loss must fall, as between the drawer and payee of the original check, upon the latter and not upon the former.

ACTION by N. Rufus Gill, executor of Mary A. Dodge, upon a check drawn by William H. Anderson, in favor of Mary A. Dodge, on J. Nicholson & Sons, bankers. Anderson was the defendant. The case was tried by the court, by agreement of counsel, without a jury. The plaintiff prayed the court "to find as matter of law that under the agreed statement of facts the plaintiff is entitled to a verdict for the amount of the check," etc., with interest. This was granted, and the defendant excepted. The defendant's first prayer was "that the court declare as a matter of law that under the pleadings and agreed statement of facts in this case the verdict must be

for the defendant." This was rejected, and the defendant excepted. There was a verdict and judgment for the plaintiff, and the defendant appealed.

Edward C. Eichelberger, for the appellant.

William Knower, William S. Bryan, Jr., Edward N. Rich and M. R. Gill & Sons, for the appellee.

³¹⁴ **McSHERBY, J.** On the 13th of January, 1892, Anderson, the appellant, drew his check in favor of Mary A. Dodge on J. J. Nicholson & Sons, bankers in the city of Baltimore, for six hundred and ninety-two dollars and three cents, and delivered it to the payee the same day. She forthwith deposited it to her credit in her account with the Old Town Bank of the same city, duly indorsed for collection. On the following day, the 14th, the Old Town Bank sent the check by its runner to the banking house of Nicholson & Sons, where it was presented for payment shortly before 11 o'clock A. M., during the usual hours of business. Anderson had to his credit on deposit with Nicholson & Sons at that time five thousand dollars available for the payment of the check. Instead of getting cash for the check the runner accepted in lieu thereof a check drawn by Nicholson & Sons on the Western National Bank for the precise amount of Anderson's check, and delivered up the latter to Nicholson ³¹⁵ & Sons. The banking house of Nicholson & Sons was situated about three blocks distant from the Western National Bank, and it would not have required more than from five to ten minutes for the runner to have walked from the one to the other. But in place of doing this, and presenting Nicholson & Sons' check to the Western National Bank, and getting it cashed or certified, he took it to the Old Town Bank, where it remained in the possession of the latter until after Nicholson & Sons failed and closed their doors at 1:30 P. M. the same day. By this failure Anderson lost the five thousand dollars on deposit to his credit with them. Up to that hour the Western National Bank had ample funds belonging to Nicholson & Sons with which to cash the check given to the Old Town Bank. Shortly before 3 o'clock, and after the failure of Nicholson & Sons, the Old Town Bank sent the check it had received from Nicholson & Sons in lieu of Anderson's check to the Western National Bank, and presented it for payment, but it was dishonored; whereupon the runner went

with it to the banking house of Nicholson & Sons to surrender it, and to demand a return of Anderson's check, but he was unable to gain admittance. About 5 P. M. of the same day the cashier of the Old Town Bank was allowed to enter, and, at his instance, a notary took a copy of Anderson's check, and protested the check, of which notice was mailed the same evening to Anderson, and received by him the next day. Subsequently, the Old Town Bank replevied the check from the trustees of Nicholson & Sons, and still has it, that case not having been disposed of yet. After the Anderson check had been presented to Nicholson & Sons, on the morning of January the 14th, and after the runner of the Old Town Bank had surrendered it, and accepted in lieu of it the check on the Western National Bank, two other checks were given by Nicholson & Sons upon the Western National Bank, one for nineteen hundred dollars to the runner of the Merchants' National Bank, and one for eighteen hundred dollars to the runner of the National Bank of Baltimore, and each of these was presented to the Western National Bank before 1:30 P. M. of the same day, and paid or certified by it.

With this state of facts existing, the executor of Mary A. Dodge sued Anderson to recover the six hundred and ninety-two dollars and three cents due by him to her when the check was given on January 13, 1892; and the inquiry presented by the record is whether, under the circumstances, Anderson is still liable for that debt. It was held by the court below that he was, and from the judgment against him he has appealed.

As between the parties to a check, the drawer remains liable upon it to the holder until the bar of the statute of limitations supervenes and releases him, if availed of, unless the omission or neglect of the holder to present it within a reasonable time after its receipt has resulted in injury or loss to the drawer. A failure of the bank which is the drawee of the check, and which held on deposit a fund to meet it, by which failure that fund is lost, presents the usual, if not the only, case in which delay of the holder, in making presentment, or giving notice of dishonor, devolves loss upon him: Daniell on Negotiable Instruments, sec. 1590. Speaking generally, what is a reasonable time depends on the facts of each particular case; but it is thoroughly settled that the reasonable time allowed the holder for presenting a check when he re-

ceives it in the same place where the bank on which it is drawn is located is till the close of banking hours on the next secular day; and if in the mean time the bank fails, the loss will fall on the drawer: Daniell on Negotiable Instruments, sec. 1591; Byles on Bills, side page 14; *Moule v. Brown*, 4 Bing. N. C. 266; *Boddington v. Schlencker*, 4 Barn. & Adol. 752. Every drawer of a check assumes the risk of the drawee's solvency during that period of time. It is consequently ^{§17} obvious that Anderson would have continued liable had the check been presented on the 14th during business hours, though after the failure of Nicholson & Sons. But it was presented to the drawees before their failure, and would have been paid when presented had the cash been then demanded; or, had the check on the Western National Bank been presented for payment or certification at any time that day before Nicholson & Sons actually suspended and closed their doors, the money would have been obtained. Whilst, therefore, it is apparent that the mere passivity of the holder—her mere failure to present the check on the 14th, prior to the suspension of the drawees—would not of itself have discharged the drawer, yet another element has entered into the case, and the holder, having chosen to present the check before there was any obligation on her part to do so, and having furthermore chosen, through her agent, to surrender it, and to accept the drawee's check instead of money, what, then, became the degree of diligence which she owed to Anderson in order still to hold him liable? This is the crucial question in the case.

Now, a check on a bank or banker is payable in money, and in nothing else: Morse on Banks and Banking, 2d ed., 268. The drawer having funds to his credit with the drawee has a right to assume that the payee will, upon presentation, exact in payment precisely what the check was given for, and that he will not accept, in lieu thereof, something for which it had not been drawn. It is certainly not within his contemplation that the payee should, upon presentation, instead of requiring the cash to be paid, accept at the drawer's risk a check of the drawee upon some other bank or banker. The holder had a right to make immediate demand for payment upon receipt of Anderson's check, though she was not bound to do so. When her agent, the Old Town Bank—the collecting bank being the agent of the holder (*Dodge v. Freedman's etc.* ^{§18} *Trust Co.*, 93 U. S. 379), did make demand, it

was only authorized to receive money: *Ward v. Smith*, 7 Wall. 451; and the acceptance by the collecting agent of anything else rendered it as liable to the holder as though it had collected the cash: *Fifth Nat. Bank v. Ashworth*, 123 Pa. St. 212. The acceptance of Nicholson & Sons' check on the Western National Bank was either payment of Anderson's check, or it was not. If it was, as it would be according to the Massachusetts doctrine (*The Kimball*, 3 Wall. 37), then his liability was extinguished. If it was not a payment, then the holder's collecting agent is responsible to her for having given up the check without payment; and if injury resulted to Anderson by reason of that agent's failure to use due diligence in converting Nicholson & Sons' check into money, then also is Anderson discharged, because the agent's failure to use due diligence is the failure of that agent's principal. But, whilst a check drawn bona fide on a banker having funds of the drawer is prima facie payment if accepted as cash (*Woodville v. Reed*, 26 Md. 190), still, in the absence of an express agreement, the acceptance of a check of either the debtor or a third party is, in fact, merely conditional payment, that is, satisfaction of the debt if and when paid: *Haines v. Pearce*, 41 Md. 221; but the acceptance of such check implies an undertaking of due diligence in presenting it for payment, and, if the party from whom it is received sustains loss by want of such diligence, it will be held to operate as actual payment: *Kilpatrick v. Home etc. Assn.*, 119 Pa. St. 30; *Freeholders of Middlesex v. Thomas*, 20 N. J. Eq. 39. What, then, is the degree of diligence required under such conditions?

The rule fixing the close of business hours of the next secular day as a reasonable time within which a check may be presented, so as to hold the drawer when drawn on a ²¹⁹ bank in the same place where it is delivered, has relation only to the contract and liability of the parties to the instrument, and does not apply to a check given by the drawee to the payee, or to the agent of the payee, of the original check, upon its surrender. There is no unbending or inflexible rule governing this latter condition of facts, and in the nature of things there could not well be. What would be due diligence under one condition of facts might be negligence under different circumstances; and all that can be definitely laid down is that each case must in this particular be decided upon its own peculiar facts, though in no instance can the liability of

the drawer be extended beyond the period which would ordinarily limit it. The holder of a substituted check taken upon the surrender of the original check to the drawee thereof must use such diligence in presenting it for payment as a prudent man would under like conditions use. This imposes no hardship upon the person who voluntarily accepts the drawee's check instead of cash. If he has had ample and abundant time to convert the drawee's check into money, and still omits to do so, he obviously has not used due diligence, and the results of such negligence should not be visited upon the original drawer, who was in no way responsible therefor. Whether a delay to present the drawee's check till the close of business hours is due diligence cannot be asserted as an invariable rule. In some instances it might be, whilst in others it would manifestly not be. We have said that what is due diligence or a reasonable time within which to make presentment depends upon the circumstances of each case; and so the authorities hold. This, too, is by 45 & 46 Vict., c. 61, sec. 45—the Bills of Exchange Act—the statutory law of England. Where the facts are undisputed it is a question of law for the court: *Bell v. Hagerstown Bank*, 7 Gill, 223; *Sasscer v. Farmers' Bank*, 4 Md. 409; *Staylor v. Ball*, 24 Md. 184; *Woodruff v. Plant*, 41 Conn. 344. That a higher degree of diligence ³²⁰ is demanded under facts like those before us than that which obtains between the parties to the instrument is obvious, because, as we have said, the drawer of the original check must be held to have contemplated that when presented it would be paid in money only, and the payee and drawee have no right, except at their own peril, to substitute some other mode of settlement which results in injury to the drawer: *People etc. v. Cromwell*, 102 N. Y. 477. Had the holder through her agent caused Anderson's check to be certified by Nicholson & Sons, the drawer would have been discharged at once: *First Nat. Bank v. Leach*, 52 N. Y. 350; 11 Am. Rep. 708; *Girard Bank v. Bank of Penn Township*, 39 Pa. St. 92; 80 Am. Dec. 507; *First Nat. Bank v. Whitman*, 94 U. S. 343. The reason for this is, that as soon as the check is certified the funds cease to be under the control of the depositor, and pass under the control of the person who procures the certification of the check drawn in his favor. But, whilst the transaction before us was different, the drawer was undoubtedly placed in a position of peril by the act of the collecting agent. When Nicholson & Sons gave to the Old Town

Bank their check in exchange for Anderson's, it is a legitimate inference, founded on the well-known and universal custom and course of dealing on the part of banks and bankers, that they charged Anderson's account with the amount of that check, and thus reduced the sum to his credit six hundred and ninety-two dollars and three cents below the five thousand dollars, which stood there before his check to Mrs. Dodge had been presented and taken up. He could not, probably, have checked out at noon on January 14th the whole five thousand dollars, because his account had, as the necessary result of the act of the Old Town Bank, been reduced the exact amount of his check to Mrs. Dodge, in lieu of which the Old Town Bank had accepted Nicholson & Sons' check on the Western National Bank. His control, therefore, over that much of his deposit might ²²¹ have been as effectually gone as if his check had been certified by Nicholson & Sons. This circumstance, whilst not making Nicholson & Sons' check to the Old Town Bank a payment, unless specially agreed to be taken as such, serves, though adverted to only by way of illustration, to emphasize the necessity the Old Town Bank was under of promptness and diligence in collecting the check on the Western National Bank, or of having it duly certified with a view both of relieving itself from liability to Mrs. Dodge, and also of holding Anderson liable as drawer, in the event of a refusal by the Western National Bank to honor Nicholson & Sons' check on it. We hold, then, that when the payee of a check, or his agent, takes from the drawee, who has ample funds of the drawer, a check of the drawee on some other bank or banker, instead of money, he, the payee, or his agent, must use the utmost diligence to present the substituted check for payment: 2 Daniell on Negotiable Instruments, 605; 3 Randall on Commercial Paper, sec. 1105; *Smith v. Miller*, 43 N. Y. 171; 3 Am. Rep. 690; 52 N. Y. 545; *East River Bank v. Gedney*, 4 E. D. Smith, 582; *Merchants' Nat. Bank v. Samuel*, 20 Fed. Rep. 664; *People etc. v. Cromwell*, 102 N. Y. 477; *Merchants' Bank v. Bank of Commerce*, 24 Md. 12; Chitty on Bills, 13th Am. ed., side page 400.

Whilst the Old Town Bank was not bound to have made demand upon Nicholson & Sons when it was made, still having made it, and, by its own choice, not having received the cash, it cannot, if it has not used due diligence, claim the right to undo what it had done, and by a subsequent

demand put itself in the position it would have occupied had it not made the first demand at the time it did make it, or done the act it then did. "If presentment for payment be actually made on the very day ³²³ the check is drawn and payment tendered, the holder cannot then change his mind and leave the funds at the drawer's risk until the next day. He is allowed until the next day as matter of convenience and accommodation to him, and whilst he need not hurry to make presentment the same day, having once done so, he has fixed the money at his own risk": 2 Daniell on Negotiable Instruments, sec. 1593; citing *Simpson v. Pacific Mut. Life Ins. Co.*, 44 Cal. 141.

That Anderson was in fact injured by what was done is manifest, and it is no answer to say he might or would have been equally injured had the holder of the check remained passive until after the failure of Nicholson & Sons. In the one case the injury was the direct result of the payee's negligence after the presentation of Anderson's check to the drawees; in the other, had it occurred, it would have been only incident to a mere permissive or lawful inaction or passivity.

The record shows that the runner of the Old Town Bank presented Anderson's check at the counter of Nicholson & Sons about 10:45 A. M.; that Anderson had at that time ample funds to his credit with the drawees for its payment in cash, but that the runner surrendered the check and accepted Nicholson & Sons' check on the Western National Bank in lieu of the cash. This check was not presented to the Western National Bank for nearly four hours after its receipt, though with due diligence it might have been presented within five or ten minutes after it went into the possession of the agent of the Old Town Bank; and if it had been then presented, or even had been presented within two and a half hours after its receipt, it would have been paid. The record further shows that two other checks for considerable amounts were drawn by Nicholson & Sons on the Western National Bank after the delivery of the one to the runner of the Old Town Bank, and both of these were presented ³²³ and paid or certified before Nicholson & Sons closed their doors. Had the same diligence been used by the Old Town Bank, the check delivered to it would have been paid also. But no such diligence was used, and because it was not, the check was dishonored. Anderson was not privy to this transaction, and

obviously ought not to be held responsible for the negligence of the payee's own agent. If he should be, the Old Town Bank would be discharged from all responsibility, though by its acts, and not by his, the loss would fall on him. He would be held because of its failure to use due diligence, though it was the payee's and not his agent.

Smith v. Miller, 43 N. Y. 171, 3 Am. Rep. 690, was an action for unpaid balance of the price of goods sold by the plaintiffs to the defendants. The defendants set up a defense of payment by a draft drawn by them on James K. Place & Co., of New York, to the order of the plaintiffs. The draft was received by the plaintiffs by mail on the morning of November 19th, and was immediately indorsed by the plaintiffs, and about 1:30 in the afternoon of the same day was presented for payment at the counting-house of J. K. Place & Co., the drawees, who were merchants in New York in good standing. In payment of the draft, J. K. Place & Co. gave their check on the Manufacturers' National Bank to the order of the plaintiffs for the full amount. At the time the check was received by the plaintiffs, J. K. Place & Co. had funds in that bank to meet the check, which would have been paid had it been presented on that day. The check was deposited on the same afternoon in the Citizens' Bank for collection, and was not presented for payment at the Manufacturers' Bank till 12 m. the next day, on the morning of which day J. K. Place & Co. failed, and on that account payment of the check was refused. It was held the plaintiffs could not recover on two grounds, the second of which was their negligence in not presenting the check for payment ³²⁴ upon the day they received it, although they had but two hours on that day in which to present it. In the course of its opinion the court said: "But a check is payable instantly; and, as between the drawer and payee, the latter has, in analogy to the rules applicable to inland bills of exchange, until the day after the receipt of a check to present it for payment when drawn on a bank in the same place where given and received. But the duty of the plaintiffs to the defendants is not determined by that rule of commercial law. That rule has respect only to the contract and liability of the parties to the instrument. When a check is taken instead of money by one acting for others, as was done by the plaintiffs, a delay of presentment for a day, or for any time beyond that within which, with proper and reasonable dili-

gence, it can be presented, is at the peril of the party thus retaining the check and postponing presentment, as between him and the persons in interest whom he represents. . . . Two checks drawn later in the day, one for eleven thousand dollars and one for nine thousand five hundred dollars, were presented at the bank and certified before 3 o'clock of that day, and subsequently paid. The same diligence by the plaintiffs as was exercised by the holders of these checks would have obtained the money. . . . By their delay and neglect they . . . made the check their own, and the defendants were discharged."

Merchants' Nat. Bank v. Samuel, 20 Fed. Rep. 664, was a suit by the indorsee of a draft against the drawers. It was received by the plaintiffs on June 18, 1883, and presented for payment on the same day. Instead of paying cash, the drawees gave the plaintiff a check on their bank in New York, which was accepted, and the draft was delivered up to the payee. The check was not presented until June 19th, and was then dishonored. Upon refusal plaintiff went to the drawees of the draft and returned the check, and received the draft back again, ³²⁵ and upon the same day had it protested for nonpayment. Thereafter it instituted this suit. The verdict was for defendants. The court said: "The payment of the draft was to be in cash; and if anything except cash was received, and in consequence thereof the drawer of the draft was damnified, then the damages sustained he has a right to be indemnified for by the negligent party. . . . The draft should have been paid in cash; and, if the plaintiff chose to receive, instead of cash, the drawee's check, it did so at its own risk, and, if any loss followed, the plaintiff must bear the same."

Merchants' Bank v. Bank of Commerce, 24 Md. 12, though not strictly in point throughout, is an express decision as to what constitutes negligence on the part of a collecting agent. There the New York bank transmitted to the Baltimore bank for collection a draft drawn by Hoffman & Co. on Josiah Lee & Co. It was received on the morning of October 30, 1860, and presented by the runner of the Merchants' Bank to the drawees at 1 P. M. of the same day. Lee & Co. gave the runner a check drawn by them on the Mechanics' Bank, and the runner surrendered the draft, and, though the banking house of Lee & Co. and the Mechanics' Bank were in the same block, he took the check to the Merchants' Bank without presenting

it for payment. A little before 3 P. M. of the same day the check was presented to the Mechanics' Bank but dishonored, and Lee & Co. suspended. The runner of the Merchants' Bank returned the check to Lee & Co., and got back the draft, and had it protested. Other checks drawn by Lee & Co. after the one in question, and aggregating thirteen thousand dollars, were presented and paid. There was evidence tending to show that Lee & Co. were of doubtful credit; and upon other points there was some conflicting evidence. The court instructed the jury that the Bank of Commerce was entitled to recover from the ³²⁶ Merchants' Bank, provided the jury found that the Merchants' Bank, in failing to present the check of Lee & Co. for payment before 3 P. M., was guilty of a want of due care, skill, and diligence in their employment as collectors of the draft, and provided they also found that the check on the Mechanics' Bank would have been paid had it been presented for payment between the hours of 1 and 2 o'clock of that day. The verdict was for the Bank of Commerce, and the judgment entered thereon was affirmed upon appeal. The negligence which made the collecting agent liable to its principal, the Bank of Commerce, was its delay of one hour in presenting Lee & Co's check for payment.

It follows from the views we have expressed that the Old Town Bank, as the agent of the appellee's testatrix, failed to use due diligence and skill to collect the check given to it by Nicholson & Sons on the Western National Bank, whereby injury was done to Anderson; and, as a consequence, that Anderson was discharged. This being so, there was error in granting the appellee's prayer and in rejecting the appellant's first prayer. The latter should have been granted, and, as it is decisive of the case, the judgment must be reversed, without awarding a new trial.

Judgment reversed, with costs above and below, without awarding a new trial.

CHECKS—PRESENTMENT—PAYMENT—LIABILITY OF DRAWER—CERTIFICATION.—A check must be presented within a reasonable time, in order to charge the drawer or indorser, in case of failure of the drawee. What constitutes a reasonable time generally depends upon the circumstances of the case, and the relations which exist between the parties; but it is almost a universal rule that if the bank upon which the check is drawn and the holder are in the same place, the check must, in the absence of special circumstances, be presented for payment within the banking hours of the day it is received, or on the day after it is received, and if the bank fails in the

mean time, the loss will unquestionably fall upon the drawer: See monographic note to *Holmes v. Briggs*, 17 Am. St. Rep. 808; note to *First Nat. Bank v. Miller*, 40 Am. St. Rep. 504. If the check is not presented within a reasonable time, according to the circumstances, the maker or indorser is released from liability: *Scroggin v. McClelland*, 37 Neb. 644; 40 Am. St. Rep. 520. Delay in presenting a check for payment is immaterial unless it injures the drawer: *Compton v. Gilman*, 19 W. Va. 312; 42 Am. Rep. 776; but the failure of the holder who has accepted a check in payment to present it for payment within a reasonable time relieves the drawer from liability in case of the bank's becoming insolvent in the mean time. Thus the defendant firm, who were indebted to the plaintiff firm, forwarded a draft to another firm doing business in the same place as plaintiff, who presented the draft and received the firm's check. Plaintiff then deposited the check in its own bank, and presented it the next day, when the bank had failed, though if it had been presented on the day when received it would have been paid. The court decided that plaintiff was guilty of laches, and that defendant was released from liability: See monographic note to *Holmes v. Briggs*, 17 Am. St. Rep. 808, 809. Where the holder of a check procures it to be certified, this operates as a payment of the debt for which the check was drawn, and the drawer is released from liability: *Born v. First Nat. Bank*, 123 Ind. 78; 18 Am. St. Rep. 312, and note; *Metropolitan Nat. Bank v. Jones*, 137 Ill. 634; 31 Am. St. Rep. 403. The question of diligence in the presentment of a check becomes one of law for the court where the facts are undisputed: See monographic note to *Holmes v. Briggs*, 17 Am. St. Rep. 808. A case in which the drawee of a check has funds of the drawer with which to pay it when presented must be distinguished from a case in which he has no such funds where the holder of the check accepts the check of the drawee on another bank in lieu of cash. Thus, if the drawee of a check drawn on a bank is unable to pay it when presented, its surrender by the payee and his acceptance of a worthless substituted check drawn upon another bank having no funds of its drawer causes no injury to the drawer of the original check, and where the drawee of the original check suspends business, and fails within thirty minutes afterward, the mere failure to present the worthless substituted check to the other bank for payment within that time likewise produces no injury to the drawer of the original check, and he remains liable where presentment of the original check was made earlier than it was necessary under the law to make it: *First Nat. Bank v. Buckhannon Bank*, 80 Md. 475.

BALTIMORE AND OHIO RAILROAD CO. v. STATE.

[79 MARYLAND, 335.]

NEGLIGENCE OF DRIVER, WHEN NOT IMPUTABLE TO ONE RIDING. — The negligence of an able and competent driver of a private carriage, drawn by a quiet horse, and at whose invitation one is taking a gratuitous ride, is not imputable to the person so riding where he has no control of the driver or of the horse and carriage. Hence, if the carriage collides with a railroad train, and the person accepting the ride is killed, contributory negligence of the driver is no defense to an action for damages against the railroad company for causing such death.

APPEAL—REVERSAL OF JUDGMENT.—THE ERRONEOUS ADMISSION OF EVIDENCE which could not properly have influenced the jury to a result different from that at which they arrived from the consideration of the other evidence in the cause does not justify a reversal of judgment.

George Dobbin Penniman, W. Irvine Cross, and John K. Cowen, for the appellant.

William F. Porter and Henry V. D. Johns, for the appellee.

341 ROBERTS, J. This action was brought in the Baltimore city court in the name of the state, as plaintiff, for the use of the widow and son of August Strunz, who was killed by what is alleged to have been the wrongful act, neglect, or default of the defendant corporation. There was a verdict for the plaintiff and judgment thereon, from which the defendant has appealed.

The accident happened at what is known as the Ridgely street crossing of the Baltimore and Ohio Railroad, at the 342 corner of Ridgely and Ostend streets in the city of Baltimore. Ostend street runs east and west, and the defendant occupied the bed of the street at this point, with two tracks, which constitute part of the main line between Baltimore and Washington. Ridgely street runs north and south, and the railroad crossing is at grade. The defendant, in compliance with article 4, section 763, of the Code of Public Local Laws, maintains a safety gate on either side of its track at this point, and the gateman's box is on the south side of the track on Ridgely street.

The train which caused the accident left Camden station on the 10th of January, 1893, at 3:01 in the afternoon to run to Washington. It was behind schedule time, and was running at a rate of speed greater than the limit fixed by the city ordinance. The crossing is dangerous, rendered especially so from the fact that on the northeast corner of Ostend and Ridgely streets there is a high bank, which cuts off the

view from Ridgely street of the track toward the east; and, at the time of the accident, a high wind was prevailing, making it almost impossible to hear the sound of an approaching train. It is not until a driver approaches to within forty feet of the track that a view, in an easterly direction, down the track can be obtained, and then only for a distance of about two hundred and twenty-six feet. Both safety gates were up, and, in consequence of the severe winter weather, only one could be operated and that with difficulty. Neither Schneider, the driver and owner of the horse and wagon, nor Strunz had knowledge of the defendant's inability to use the gates. As to the position and conduct of the flagman at the time of the accident the testimony is conflicting.

Under these circumstances, August Strunz, as the invited guest of Adam Schneider, an able and competent driver of a quiet horse, accompanied him into the city of Baltimore from the town of Westport, which is also within the corporate limits of the city. Westport is located at the extreme ²⁴³ end of Ridgely street, and a short distance from the railroad crossing. On their return trip to Westport, Schneider, driving his own horse and wagon, was seated on the right-hand and Strunz on the left-hand side of the front seat. The testimony is also conflicting as to the speed at which Schneider was driving as he approached the crossing, and as to whether he stopped, looked, and listened before he attempted to cross.

There are, in point of fact, all through the case two versions of the circumstances attending the accident, and two conflicting stories are told, the one diametrically opposed to the other.

There is substantially but one question in controversy on this appeal, and the argument on the part of the appellant clearly outlines the request that we review and modify the decision pronounced by this court in the case of *Philadelphia etc. R. R. Co. v. Hogeland*, 66 Md. 149; 59 Am. Rep. 159. The two cases are in many respects identically the same as to the facts, and, such being the case, the law applicable to the one case ought to control in the other, unless we have violated some settled principle of the law in the decision of the *Hogeland* case. It is contended in this case that it varies somewhat from *Hogeland's* in this, that, after Schneider stopped his wagon to look and listen for an approaching train, he remarked to Strunz, "It seems all right," and Strunz

ejaculated, "hun hah," which Schneider thought expressed his assent that it was all right, and that it would be safe to cross.

It is the generally accepted doctrine of the courts of this country that the contributory negligence of a carrier, or the driver of a public or private vehicle, not owned or controlled by the passenger, and who is himself without fault, will not constitute a bar to the right of a passenger to recover for injuries received. The only principle upon which such contributory negligence could bar the right of recovery is, that the driver should be regarded ²⁴⁴ as the agent or servant of the passenger. But when, as in this case, he has no control over the driver, and does not own the vehicle, and is without blame, and there is no ground, in truth and reality, for holding him to be the principal or master, there is neither reason nor justice in holding him bound by the contributory negligence of the driver: *Philadelphia etc. R. R. Co. v. Hogeland*, 66 Md. 164, 165; 59 Am. Rep. 159. But suppose Strunz, instead of assenting, had plainly indicated his dissent, he was not the owner nor in control of the horse and wagon, and in no position to restrain the action of Schneider. Would there, under these circumstances, be reason or justice in holding Strunz responsible for the conduct of Schneider? We think not; and thus holding, we find no substantial difference between this case and the case of *Hogeland*.

The appellant has directed our attention to the case of *Dean v. Pennsylvania R. R. Co.*, 129 Pa. St. 514, 15 Am. St. Rep. 733, and that of *Brickell v. New York etc. R. R. Co.*, 120 N. Y. 290, 17 Am. St. Rep. 648, as contravening the rule announced by this court. A careful examination of *Dean's* case will disclose the fact that the principles of law which it maintains in no manner conflict with the doctrine announced by this court. It condemns the decision of *Thorogood v. Bryan*, 8 Com. B. 115, as being at variance with reason and common sense, and places to its credit many erroneous decisions which have followed in its wake.

The case of *Brickell v. New York etc. R. R. Co.*, 120 N. Y. 290, 17 Am. St. Rep. 648, is the other case supposed to be at variance with the decision in *Philadelphia etc. R. R. Co. v. Hogeland*, 66 Md. 164, 165, 59 Am. Rep. 159, but it rests upon a state of facts differing widely from the circumstances of the case at bar or that of *Hogeland*. We have examined the case

with care, and do not think it justifies the use sought to be made of it, as the authority upon which it rests does not sustain it. Like this court in *Philadelphia etc. R. R. Co. v. Hoge-land*, 66 Md. 164, 165; 59 Am. Rep. 159, so the court in *Brickell v. New York etc. R. R. Co.*, 120 N. Y. 290, 17 Am. St. Rep. 648, quotes *Robinson v. New York etc. R. R. Co.*, ²⁴⁵ 66 N. Y. 11, 23 Am. Rep. 1, as authority. That there may be no misapprehension as to what was decided in *Robinson v. New York etc. R. R. Co.*, 66 N. Y. 11, 23 Am. Rep. 1, we quote the language of Church, chief judge, who delivered the opinion. He says: "The court held that if the defendant was negligent, and the plaintiff was free from negligence herself, she was entitled to recover, although the driver might be guilty of negligence which contributed to the injury.

"In determining this question it is important first to ascertain the relation which existed between the plaintiff and Coulon, the driver. It is very clear and was found by the jury that the relation of master and servant did not exist. Nor was Coulon, in any sense, the agent of the plaintiff. He had invited the plaintiff to ride to a certain place, which she declined, but stated that if he would come on a specified day she would ride with him to another place where she desired to go for a visit, and it was during that ride that the accident occurred. I do not think that the change affected the relation between the parties. It was the same as if the plaintiff had accepted the first invitation. It is, therefore, the case of a gratuitous ride by a female upon the invitation of the owner of a horse and carriage. The plaintiff had no control of the vehicle, nor of the driver in its management. It is not claimed but that Coulon was an able-bodied, competent person to manage the establishment, nor that he was intoxicated, or in any way unfit to have charge of it. Upon what principle is it that his negligence is imputable to the plaintiff? It is conceded that if by his negligence he had injured a third person she would not be liable. She was not responsible for his acts, and had no right and no power to control them. True, she had consented to ride with him, but as he was in every respect competent and suitable, she was not negligent in doing so. Can she be held, by consenting to ride with him, to guarantee this perfect care and diligence? There was no necessity for riding with him. It was a voluntary ²⁴⁶ act on the part of the plaintiff, but it was not an unlawful or negligent act. She was injured by the negligence of a third person, and was

free from negligence herself, and I am unable to perceive any reason for imputing Coulon's negligence to her."

As already stated, the case of *Thorogood v. Bryan*, 8 Com. B. 115, had been for many years the groundwork of the English cases of imputed negligence, and had in some of the American decisions been accepted as correct in principle; but in the recent case of *The Bernina*, L. R. 12 P. D. 58, 82 (1887), it has been by the English court of appeals expressly overruled. Lord Esher, M. R., after an extended review of the English and American cases, said: "After having thus laboriously inquired into the matter, and having considered the case of *Thorogood v. Bryan*, 8 Com. B. 115, we cannot see any principle on which it can be supported; and we think that, with the exception of the weighty observation of Lord Bramwell, though that does not seem to be a final view, the preponderance of judicial and professional opinion in England is against it, and that the weight of judicial opinion in America is also against it. We are of opinion that the proposition maintained in it is erroneously unjust and inconsistent with other recognized propositions of law. As to the propriety of dealing with it, at this time, in a court of appeals, it is a case which, from the time of its publication, has been constantly criticised, and no one can have gone into or have abstained from going into an omnibus, railroad or ship, on the faith of the decision. We therefore think that, now that the question is for the first time before an English court of appeal, the case of *Thorogood v. Bryan*, 8 Com. B. 115, must be overruled."

But whatever conflict may be found to exist in the decisions relating to this subject, the decided weight of authority is in favor of the view heretofore expressed by this court; and upon further reflection and consideration, we ³⁴⁷ are of the opinion that the doctrine announced in *Philadelphia etc. R. R. Co. v. Hogeland*, 66 Md. 164, 165, 59 Am. Rep. 159, is just and reasonable, and based upon sound principles of law, which in a case such as we are now considering ought not to be modified or disturbed.

There are two exceptions taken to the admissibility of certain evidence. The first relates to the use of defendant's time-table for the purpose of showing the distances between certain stations on defendant's road, and also as showing the time in which defendant's engineers and conductors were directed to run its trains between the same stations—such

stations being those located between Camden station and the Ridgely street crossing—when the accident happened. We fail to see how the defendant has been injured by the use made of the time-table, especially when considered in connection with the other testimony in the cause. Whether the court erred or not in the admission of the time-table offered in evidence, as an abstract legal proposition, will not necessarily justify a reversal of the judgment. If the evidence offered and admitted could not properly have influenced the jury to a result different from that at which they arrived from the consideration of the other evidence in the cause, then in such case, if it were improperly admitted, the error would have been a mere abstract error, which would not work a reversal of the judgment. It has been almost universally held that neither the admission nor the exclusion of testimony, when it does not appear to have affected the result or prejudiced the appellant, will be regarded as sufficient ground for reversal.

The second exception is taken to the admissibility of one of the rules of the defendant company, regulating the speed of passenger trains, but we see nothing in it calculated improperly to interfere with or prejudice the defendant.

The instructions asked by the plaintiff were properly granted. Nor do we find any error in the action of the court below in rejecting the defendant's first, third, fourth, sixth, seventh, eighth, and ninth prayers. The defendant's ²⁴⁸ eighth and ninth prayers contain the propositions of law which we have discussed at some length herein, and they have been disposed of by what has already been said. It seems to us that, by the defendant's second, fifth, and tenth prayers granted by the court, the jury were instructed in terms quite as favorable as the defendant was entitled to receive. The judgment must therefore be affirmed.

Judgment affirmed, with costs.

NEGLIGENCE OF DRIVER NOT IMPUTABLE TO PERSON RIDING.—The negligence of the driver of a private vehicle cannot be imputed to one riding with him when the latter is himself free from blame: *Miller v. Louisville etc. Ry. Co.*, 128 Ind. 97; 25 Am. St. Rep. 416, and note; but there are cases to the contrary: *Mullen v. City of Owasso*, 100 Mich. 103; 43 Am. St. Rep. 436, and discussion in note thereto.

APPEAL.—ERROR IN ADMITTING EVIDENCE, if the same result must have been reached had the evidence been excluded, is no ground of reversal; *Rockhill v. Spraggs*, 9 Ind. 30; 68 Am. Dec. 607, and note; *Lakman v. Polard*, 43 Me. 463; 69 Am. Dec. 77, and note.

MULLEN v. SANBORN.

[79 MARYLAND, 384.]

Process—Exemption of Nonresident Witness and Sutor from Service of.—If a nonresident voluntarily appears in the courts of this state for the purpose of suing out an attachment for fraud against a citizen here, and gives a bond, but the attachment is quashed, he is not exempt from the service of a summons issued to bring him into court to respond in damages for the wrongful and malicious issuing of the attachment where he comes into this state, after the quashing of the attachment, for the purpose of testifying in the main action.

Rufus W. Applegarth and Henry C. Kennard, for the appellant.

John Hinkley and Bernard Carter, for the appellees.

385 FOWLER, J. Edward F. Sanborn and Arthur C. Mann, trading as Sanborn & Mann, residing and doing business in Massachusetts, issued out of the Baltimore city court an attachment on original process against Joseph Mullen, a citizen of this state and a resident of Baltimore city. This attachment was subsequently quashed, and the short note case was prosecuted, but without success. Sanborn, one of the plaintiffs in the attachment suit, was advised by his counsel here that it would be necessary for him to testify as a witness at the trial of the short note case, and it is admitted he came here for that purpose. The case, however, was continued, and Sanborn, having left the courtroom in Baltimore, was about to depart from this state for his home in Massachusetts when he was summoned as a defendant in a cause brought by the appellant, Mullen, to recover damages for wrongfully, maliciously, and without probable cause issuing the attachment above mentioned. Sanborn moved to quash the writ of summons and the return of the sheriff thereon, on the ground that being a witness from another state he was exempt from civil process while attending as a witness in the short note case, and for a reasonable time thereafter. This motion was answered by Mullen, who insisted that it should be dismissed, but the court below, being of opinion that it was bound by the decision of this court in *Bolgiano v. Gilbert Lock Co.*, 78 Md. 132, 25 Am. St. Rep. 582, passed an order quashing the writ of summons as prayed by Sanborn. From this order Mullen has appealed.

The only question, therefore, presented here is, whether under the circumstances of this case the appellee, Sanborn,

366 is exempt from the service of summons issued to bring him into court to respond in damages for the wrongful and malicious issuing of the attachment. We do not think this case is within the rule laid down by this court in *Bolgiano v. Gilbert Lock Co.*, 73 Md. 132, 25 Am. St. Rep. 582. That was the case of a witness, who was not a party to the suit, who came here from New Jersey, where he resided, for the purpose of testifying in a cause on trial in this state, and we there expressed the view that the tendency of the courts in this country "is to enlarge the privilege and afford full protection to suitors and witnesses, from all forms of process of a civil nature during their attendance before any judicial tribunal, and for a reasonable time in going and returning"; but continuing, we said: "We think the decided weight of authority has extended the privilege so far at least as to exempt a resident of another state, who comes into this state as a witness to give evidence in a cause here, from service of process for the commencement of a civil suit against him in this state, and that the privilege protects him in staying and returning, provided he acts bona fide, and without unreasonable delay." The language above quoted was, of course, used in reference to the facts of the case then before us, that of a witness who was not a party to the cause. As we did not in the case just cited undertake to lay down any general rule as to the exemption of suitors from civil process, because that was a case involving only the rights of a witness, we do not think the case now before us would justify us in announcing a rule of exemption applicable alike to all suitors in all civil actions. As to what the better rule may be, both as to plaintiffs and defendants, there is some conflict of authority; but we are all of opinion that this right of exemption should not be extended to one who, like the appellee, comes here and avails himself of the right given him by our statute to issue an attachment for fraud, or, as it is generally called, an attachment on original process. This proceeding has always been considered an extreme remedy, and the legislature 367 seeing the great temptation there would exist to abuse it, and the loss and injury to the defendant which must necessarily follow such abuse, provided by statute that no such attachment should issue until the plaintiff therein should give bond, with good security, to answer for all such costs and damages as should be awarded against him for wrongfully suing out such an attachment. When the appellee

issued the attachment, the wrongful issuing of which, and the damages thereby caused, being the causes of action in this case, he gave bond as required by law, and the appellant not only has the right to look to that bond for compensation for the injury done him by the appellee, but in most cases it is the only source from which he may hope to secure it. We have held, however, that the bond cannot be put in suit, unless a suit against the plaintiff in the attachment for wrongfully suing it out has first been prosecuted to judgment: *McLuckie v. Williams*, 68 Md. 265. The appellee having failed to prosecute his attachment with success, and the appellant having sued him in the court where the bond was filed to ascertain the damages, so that he could avail himself of a suit on the bond to make himself whole, we think the appellee should be held to have waived his right, if he had any, to exemption from summons, and should, at least, be put in the same and no worse situation than resident suitors would be under like circumstances. Having voluntarily appeared in our courts to take advantage of this peculiarly harsh remedy, and having given bond, without which he could not have attached, he ought not to be allowed to assume a position which might enable him to escape all liability for his wrongdoing, and at the same time destroy the efficacy of his bond. For, if the bond, which in many cases will alone protect the defendant from loss and his business from destruction, cannot be put in suit until the nonresident plaintiff in attachment has been sued and a judgment recovered against him in the perhaps far distant state where he resides, the value of the bond as a security ~~see~~ to the alleged debtor, and as a means of preventing the fraudulent and reckless abuse of the process of the court, will be greatly diminished, if not, in many cases, made absolutely worthless.

It would seem, therefore, that whatever rule of exemption we may adopt in regard to suitors generally, in civil actions, when the occasion arises, that neither public policy nor the due administration of justice demands that we should hold the appellee exempt from the service of the summons issued against him to compel him to answer in damages for the alleged wrongful issuing of the attachment in question. Sound public policy, on the contrary, as well as the administration of equal justice, would seem to demand that no inducements should be held out to nonresident suitors to avail themselves of the harshest remedy known to our statutes;

but if they should come, and should abuse the remedy to the injury of an alleged debtor, let them answer here as the residents of this state must do in like cases.

In conclusion, we need only say that we think it unnecessary to discuss further than we have already done: *Bolgiano v. Gilbert Lock Co.*, 73 Md. 132; 25 Am. St. Rep. 582; for whether or not the principles there announced, and the cases there cited to support them, establish, as contended by counsel for appellee in the additional brief filed a few days ago, that, generally, plaintiffs, defendants, and witnesses are all equally exempt from civil process while attending court in another state, the case now before us, for the reasons we have given, is unlike that case, and the cases therein cited.

We must not be considered as agreeing that *Bolgiano v. Gilbert Lock Co.*, 73 Md. 132, 25 Am. St. Rep. 582, goes to the extent contended for by the appellee here. The exemption from service of civil process enjoyed by witnesses in this state, under the rule laid down in the case cited, should not be further extended, except upon the most careful consideration.

Order reversed and cause remanded.

PROCESS—EXEMPTION OF PARTIES AND WITNESSES FROM SERVICE OF.—The cases are conflicting as to whether nonresident suitors and witnesses are exempt from service of process while attending court: *Fisk v. Westover*, 4 S. Dak. 233; 46 Am. St. Rep. 780, and note; *Cameron v. Roberts*, 87 Wis. 291; 41 Am. St. Rep. 43, and note. In some jurisdictions a nonresident attending a court as a witness in a suit to which he is a party is not exempt from the service of process in another suit: *Capwell v. Sipe*, 17 R. I. 475; 33 Am. St. Rep. 890.

STATE v. FOX.

[79 MARYLAND, 514.]

ANIMALS—LIABILITY FOR DEATH CAUSED BY SALE OF HORSE WITH GLANDERS.

The vendor of a horse affected with glanders and sold to an innocent purchaser by means of false representations is liable for the death of one who contracts the disease while having charge of the horse for the purchaser, if the vendor knew the disease to be imminently dangerous to human beings, and that getting it would be the natural and probable consequence of coming in contact with the animal.

JUDICIAL NOTICE—GLANDERS.—A court will not take judicial notice that there is great or imminent danger of a human being getting the glanders by simply coming in contact with a horse that has the disease.

ANIMALS—PLEADING TO RECOVER DAMAGES FOR DEATH CAUSED BY GLANDERS.—If damages are claimed against the fraudulent vendor of a horse

affected with glanders, for the death of a person contracting the disease by coming in contact with the horse, the declaration must, in effect, allege that getting the disease would be the natural and probable consequence of coming in contact with it. An allegation that the disease "may easily be communicated to human beings" is not sufficient.

ACTION in the name of the state, as plaintiff, for the use of the widow and children of John W. Hartlove, who died from what was alleged to have been the wrongful act of the defendant.

William L. Marbury and William L. Hodge, for the appellant.

Thomas R. Clendinen, for the appellees.

⁵²⁰ **BOYD, J.** A demurrer to the declaration filed in this case was sustained by the superior court of Baltimore city. Judgment ⁵²¹ was entered on the demurrer and an appeal taken to this court. It therefore becomes necessary for us to ascertain what facts are alleged as the basis of the suit, they being admitted by the demurrer to be true.

The plaintiffs allege that the defendants are dealers in horses and proprietors of a livery and sale stable, and had in their possession a mare which was "affected with a contagious and infectious disease called 'glanders,' a disease which is not only fatal to horses, but which may easily be communicated to human beings who happen to be brought into contact with horses suffering therefrom"; that the defendants, well knowing that the mare was suffering from said disease, the dangerous character of the disease, and that it was dangerous to human life, in disregard of the statutes of this state relative thereto, negligently and willfully exposed the mare for sale, and did sell her to one William H. Hartlove for the sum of seventy-five dollars; that said William H. Hartlove, "not knowing of the true condition of said mare, or that she had said disease, but relying upon and believing the assurance given him by the defendant, that she was suffering from nothing worse than a bad cold, paid for said mare, took her away and placed her in another stable where she could be and has in fact [been] attended to and treated by John W. Hartlove," a brother of William H. Hartlove, the husband of one of the equitable plaintiffs and the father of the others. They further allege that John W. Hartlove, "while attending to said mare and using due care, and not knowing that she had said disease, contracted the same and died."

Article 67, section 1, of our code provides that "whenever the death of a person shall be caused by a wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued, shall be liable to an action of ⁵²² damages, notwithstanding the death of the person injured," etc.

We are therefore to determine whether, under the facts admitted by the demurrer, John W. Hartlove, if he had survived, could have recovered under this declaration.

It is said in Benjamin on Sales, section 431, that "a man may make himself liable in an action founded on tort, for fraud or deceit or negligence, in respect of a contract brought by parties with whom he has not contracted, by a stranger, by any one of the public at large who may be injured by such deceit or negligence," although this statement is somewhat qualified in the later editions of that work.

The main difficulty consists in applying the principles applicable to such actions to the facts of the particular cases.

We will therefore examine into some of the authorities which have been brought to our attention to ascertain what the various courts have determined, with a view of applying what we deem to be the correct principles to the circumstances of this case.

The case of *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455, is one of those mainly relied on by appellants.

It has probably gone further than most of the cases, and has been somewhat criticised by some authorities. It must be conceded that the facts of that case differ in some material respects from the one we now have under consideration.

It very clearly decides, however, that the fact that the plaintiff was not a party to the contract with the defendant, but purchased the article in question from a druggist, who had bought it from another druggist, the vendee of the defendant, did not preclude a recovery. The action was founded on the negligence of the defendants, whose agent had negligently labeled a jar of what was in fact belladonna, "¹ lb. dandelion," etc. By reason of this negligent labeling, ⁵²² the intermediate vendors, as well as the plaintiff, were led to believe that it was the extract of dandelion, which was harmless, and did not know it was belladonna, which was poisonous. The court, on page 409, said: "In the pres-

ent case the sale of the poisonous article was made to a dealer in drugs, and not to a consumer; the injury, therefore, was not likely to fall on him, or on his vendee, who was also a dealer; but much more likely to be visited on a remote purchaser, as actually happened."

"The defendant's negligence put human life in imminent danger. . . . The defendant's duty arose out of the nature of his business, and the danger to others incident to its mismanagement."

On page 410 it is said: "In *Longmeid v. Holliday*, 6 Ex. 761, the distinction is recognized between an act of negligence imminently dangerous to the lives of others and one that is not so. In the former case the party guilty of the negligence is liable to the party injured, whether there be a contract between them or not; in the latter the negligent party is liable only to the party with whom he contracted, and on the ground that negligence is a breach of the contract."

As the defendant was the cause of the injury to the plaintiff without any intervening negligence of others, and it was "an act of negligence imminently dangerous to the lives of others," he was very properly held liable, although no fraud was proven or alleged.

In *Loop v. Litchfield*, 42 N. Y. 851, 1 Am. Rep. 543, it was held that the vendor of an article of his own manufacture is not liable to one who uses the same, with the consent of the purchaser, for injuries resulting from a defect therein, unless such article is, in its nature, "imminently dangerous: See, also, *Losee v. Clute*, 51 N. Y. 494; 10 Am. Rep. 638.

In *Davidson v. Nichols*, 11 Allen, 514, it was held that the sale of an article, in itself harmless, and which only became dangerous by being used in combination with ⁵²⁴ some other article, without knowledge by the vendor that it was to be so used, did not make him liable to the purchaser from the original vendee for an injury sustained by him while using it in combination with the other article, notwithstanding it was different from that which was intended to be sold. The facts of that case did not disclose any duty or obligation which rested on the defendant toward the plaintiff in the sale of the article. The court said: "We know of no duty or principle of law by which a vendor of an article can be held liable for mistakes in the nature or quality of the article arising from his carelessness and negligence, which causes loss or injury to other persons than his immediate vendee, when there has

been no fraudulent or false representation in the sale, and the article sold was in itself harmless, especially when the sale was made without any notice to the vendor that the article is bought for a third person," etc.

In *McDonald v. Snelling*, 14 Allen, 294, 92 Am. Dec. 768, the court said: "Where a right or duty is created wholly by contract, it can only be enforced between the contracting parties. But when the defendant has violated a duty imposed on him by the common law, it seems just and reasonable that he should be held liable to every person injured whose injury is the natural and probable consequence of the the misconduct. . . . Actions can be maintained only where there is shown to be: 1. A misfeasance or negligence in some particular as to which there was a duty toward the party injured, or the community generally; and 2. Where it is apparent that the harm to the person or property of another which has actually ensued was reasonably likely to ensue from the act or omission complained of."

In *Wellington v. Downer Kerosene Oil Co.*, 104 Mass. 64, 68, the court decided that where the defendant sold naphtha to a retail dealer, to be sold by him to be used in lamps for illuminating purposes, the defendant knowing it ⁵²⁵ to be explosive and dangerous to life when so used, and that the retail dealer's purpose was to sell the same, and the latter sold it to the plaintiff without either of them knowing its dangerous qualities, he was held liable and was bound to contemplate, as a natural and probable consequence of his unlawful act, that it might explode or ignite, and injure an innocent purchaser or his property, and must answer in damages for such a consequence if it should come to pass.

It was held in *Jeffrey v. Bigelow*, 13 Wend. 518, 28 Am. Dec. 476, that the sale of an animal which had a contagious disease, known to the vendor but not to the vendee, was a fraud. This is approved in Cooley on Torts, 481, first edition, where it is also said that the fraud would not only be more censurable, but more clearly actionable, if that which is exposed to injury by the concealment is the health or life of human beings: See, also, Wood on Nuisance, sec. 146.

Hill v. Balls, 2 Hurl. & N. 299, is in conflict with *Jeffrey v. Bigelow*, 13 Wend. 518, 28 Am. Dec. 476, so far as holding the concealment of the contagious disease to be a fraud, but it does not go to the extent of deciding that if in point of fact there was actual fraud or misrepresentation, the vendor

would not be responsible for all consequences which naturally resulted from the fraudulent sale.

In the cases of *Langridge v. Levy*, 2 Mees. & W. 519, 4 Mees. & W. 339, and *George v. Skivington*, L. R. 5 Ex. 1, the defendant sold the respective articles for the use of the parties injured, knowing that they were to be so used by them, and hence they present some different features from the case at bar.

Such cases as *Winterbottom v. Wright*, 10 Mees. & W. 109, and *Collis v. Selden*, L. R. 3 C. P. 495, are in harmony with *Loop v. Litchfield*, 42 N. Y. 351, 1 Am. Rep. 543, and *Losses v. Clute*, 51 N. Y. 494, 10 Am. Rep. 638, above referred to. The defendants in those cases owed no duty to the plaintiffs on account of the respective contracts, and the articles sold and the work ⁵³⁶ done were not of such a character as to be necessarily dangerous to those using them or being where they were, and hence they were not bound either by contract or by any considerations of public policy or safety.

Farrant v. Barnes, 11 Com. B., N. S., 553, is to the same effect as *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455, and *McDonald v. Snelling*, 14 Allen, 294, 92 Am. Dec. 768, as it was decided upon the principle that a man who delivered an article which he knows to be dangerous or noxious to another person, without notice of its nature and qualities, is liable for any injury which may likely result, and which does in fact result, therefrom to that person or any other who is not himself informed.

In *Heaven v. Pender*, 11 Q. B. Div. 508, Cotton, L. J., in delivering the opinion of the majority of the court and in declining to concur in all the principles enunciated by the master of rolls, said: "I in no way intimate any doubt as to the principle that any one who leaves a dangerous instrument, as a gun, in such way as to cause danger, or who without due warning supplies to others for use an instrument or thing which to his knowledge, from its construction or otherwise, is in such a condition as to cause danger, not necessarily incident to such an instrument or thing, is liable for injury caused to others by reason of his negligent acts." The appellee has cited Benjamin on Sales, edition of 1888, *Barry v. Croskey*, 2 John & H. 1, and other authorities to establish the principle that a false representation made by one person to another, upon which a third person acts, and so acting was injured, does not give such third person a right of action, unless such

false representation was made with the intent that it should be acted upon by him in the manner that occasions the injury or loss. That may be a correct doctrine as far as it goes, as established by the English courts, but we do not understand it to be the law as settled by the courts of this country, unless it be taken with the further qualification that if the act done ⁵²⁷ violate a duty owed to the particular person injured or to the public, the defendant will be liable to a third person. We are not prepared to announce as the law of this state that a vendor can, by means of false representations as to the character and condition of the thing sold, induce his vendee to purchase it from him, thereby causing him innocently to subject a third person to the injury which naturally comes from his coming in contact with the thing purchased, and still in all cases excuse liability to such third person, unless the latter can establish that such false representations were made with the direct intent of their being acted on by him in the manner that occasions the injury.

We have referred to a number of cases which present various phases of such questions as may reflect upon the one before us. Without deeming it necessary to pass upon all of them, or to go to the full extent that *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Rep. 455, has gone, we are of the opinion that the authorities, and a proper regard for the protection of innocent persons, fully justify us in the conclusion that if a vendor sells any property which he knows to be imminently dangerous to human beings, and likely to cause them injury, to an innocent vendee who is not aware of the danger, and to whom false representations have been made as an inducement to the sale, he may, under proper allegation and proof, be held responsible, not only to the vendee, but to such person or persons as the vendee may, in the ordinary course of events, call upon to take charge of the property for him. It only remains for us to determine whether the allegations made in the declaration bring this case within the above rule.

It is true that it alleges that the defendants knew that the disease of glanders was dangerous to human life, and that it may be easily communicated to human beings who happen to be brought into contact with horses suffering therefrom. It does not, however, allege that there is any ⁵²⁸ imminent or serious danger of human beings contracting the disease. The allegation that "it may easily be communicated to hu-

man beings" is not sufficient, being too indefinite and general to bring the case within what we deem to be the correct principle applicable to such cases. The declaration should allege not only that the disease was imminently dangerous, or something to that effect, but that the natural or probable consequences of human beings coming into contact was that they would contract it. Glanders is not a disease so frequently taken by man as to permit the court to take judicial notice of its character. Instances are probably very rare where they have contracted the disease. It may be true that if the disease is taken by a man his life will be in great danger; but is there great or imminent danger of his getting it by simply coming in contact with it? Is that the natural and probable result to be expected? The declaration must not leave to conjecture or implication any thing that is material.

In such cases as *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455, the defendants were held liable for the negligent sale of poison, because the probable result and natural consequence of the use of poison is the death of or injury to the person taking it; but, in cases of this character, it may not follow as a necessary or probable consequence that human beings will be injured as they may come in contact with glandered animals without contracting the disease. The declaration should have presented such a case as showed that the defendant owed a duty to the deceased not to fraudulently expose him to a disease which would probably result in his injury by coming in contact with it.

But it is also defective in not stating that John W. Hartlove contracted the disease as the probable and natural consequence of his attending to the mare. If his case is a rare exception, and a very unusual result from thus coming in contact with the disease, it would not do to hold the defendants responsible for his death. In such a ⁵²⁹ case they could not have been held to have reasonably contemplated such a result from their conduct. It would be carrying the principle too far and beyond what we believe to be authorized by the authorities. The declaration simply alleges that John W. Hartlove, while attending to said mare, and using due care, and not knowing that she had said disease, contracted the same and died. It should have alleged that he contracted the disease as the probable and natural consequence of his being brought in contact with it, or something

to that effect, and it would have been proper to set out more fully John W. Hartlove's connection with the case, so as to show that he was in the employ of or had been called in by the purchaser to attend to or treat the animal. For, although we think it can be gathered from the declaration that John W. Hartlove was acting for his brother, and was not a mere volunteer or intermeddler, it is not very explicit in that respect. What we have said above, concerning the right of one not a party to a contract to sue, has been on the assumption that the declaration does show that John W. Hartlove was attending to the mare at the instance of his brother, and for that reason we think the plaintiffs could sue the defendants, provided the circumstances were such as to justify it, and proper allegations were made, as we do not mean to decide that any third person, without his being in some way connected with the purchaser, could sue.

Being of the opinion that the declaration has not made out such a case as calls upon the defendants to plead, we think the demurrer was properly sustained, and will therefore affirm the judgment; but we will remand the case so that the plaintiffs can amend the declaration if they see proper to do so.

Judgment affirmed, with costs, and cause remanded.

THE PRINCIPAL CASE is a unique one in the modern law of negligence, and no other case of the kind has been found, though diligent search has been made. There is much strength in the argument advanced by the counsel for appellant, that a man is under a duty not to expose his fellow-men to danger, and can never lay this duty aside; that a vendor, in making a sale, is under an obligation to the public as well as to the vendee, and that he invades the rights of the public by sending out or selling an article which he knows to be dangerous to every human being brought into contact with it, and increases that danger by falsely misrepresenting the character of the article. If there is any difference between the sale of a poisonous drug negligently misrepresented and a poisonous horse fraudulently misrepresented, the difference is, we apprehend and as argued by the learned counsel, that the latter is a far more aggravated case. Aside from the fact that such acts are often made a violation of the penal laws of the state, there is a remedy for such wrongs by a civil action, and its foundation is the violation of a public duty. Thus, a dealer in drugs and medicines who carelessly labels a deadly poison as a harmless medicine, and sends it, so labeled, into the market, is responsible for his negligence to any person who, without fault on his part, is injured thereby, though it may have passed through other hands, by intermediate sales, before it reached the person injured: *Thomas v. Winchester*, 6 N. Y. 297; 57 Am. Dec. 455. So, if an apothecary negligently sells a deadly poison as and for a harmless medicine, to one person who buys it to administer to another person, and the former gives the latter a dose of it, as a

medicine, from which he dies in a few hours, a right of action in tort against the apothecary survives to the decedent's administrator: *Norton v. Sewall*, 106 Mass. 143; 8 Am. Rep. 293. It is the duty of druggists to know the properties of medicine which they sell, and to employ persons capable of discriminating and compounding according to prescription, and, if they depart from it, or ignorantly introduce other and poisonous drugs, they are responsible for the consequences to the party injured, and cannot escape responsibility by proof of extraordinary care in general: *Fleet v. Hollenbamp*, 13 B. Mon. 219; 56 Am. Dec. 563. The principle of these cases seems to be strictly analogous to that of the principal case. Analogous to the principal case are those decisions affirming that a person who, knowing himself, or a member of his family, or domestic animals owned by him or under his control, to be suffering from an infectious or contagious disease, and who wrongfully or negligently exposes others of the same species to such disease, whereby they contract it, is answerable for the damages thus due to his wrongful act: See note to *Hurst v. Warner*, 162 Mich. 238, post, p. 000.

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CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

MILLER v. PRESCOTT.

[168 MASSACHUSETTS, 12.]

LANDLORD AND TENANT.—UNLAWFUL USE OF PREMISES BY A SUBTENANT is a breach, whether known to the lessee or not, of a condition in the lease not to make or suffer any waste or any improper, unlawful, or offensive use of the premises.

LANDLORD AND TENANT.—A FORFEITURE IS NOT WAIVED BY THE ACCEPTANCE OF RENT ALREADY ACCRUED under a receipt specifying that it is not to waive any breach of the covenants and conditions of the lease.

EJECTMENT by an administrator to recover lands leased to his testator by the defendant and which were claimed to have been forfeited by a breach of the covenants of the lease. The trial judge ruled in favor of the defendant.

W. C. Wait, for the plaintiff.

W. D. Turner, for the defendant.

12 KNOWLTON, J. The plaintiff's testator, who was the lessee of the real estate described in the writ, entered into a covenant not to "make or suffer any waste, or any unlawful, improper, or offensive use of the said premises." By the terms of the report, judgment was to be entered for the defendant unless there was error in one of the two following rulings: "1. That unlawful use of the premises by a subtenant was a breach of the covenants and conditions of the lease, whether known by the plaintiff or her testator or not; 2. That if the rent for the months in question was paid over and received according to the receipts put in evidence marked Exhibit 2, that would not amount to a waiver of breaches

then known to the defendant." On these receipts for accrued rent was the following indorsement:

13 "The receipt of this rent is not to waive any breach of the covenant and conditions of the lease on the Howard street estate."

The covenant referred to is a covenant concerning land, and affecting the mode of enjoyment of it. Such a covenant runs with the land, and is binding upon persons who are in privity of estate with the covenantee. It is intended for the protection of the lessor, and he may enforce it directly against the original lessee or against an assignee of the lease. If there is no assignment of the lease, but a subletting of the whole or a part of the premises for a time less than the remainder of the term, so that no privity of estate is created between the lessor and the subtenant, the covenant would be ineffectual for the lessor's protection if he could not proceed on the ground that it applies as well to an unlawful use by a subtenant as by the original lessee. We are of opinion that the agreement not to "make or suffer" an unlawful use of the premises must be interpreted as a stipulation that there shall be no unlawful use by the original lessee, or by any person who is occupying under him. It is easy for the lessee to control the use of the property, and to protect the interests of the lessor and of himself in this particular. With this interpretation effect is given to the word "suffer." It may not be reasonable to hold that the covenant makes the lessee liable for an unlawful use of the property by trespassers; but he may well be held to "suffer" an unlawful use of the property if he does not take effectual measures to prevent such a use by those who occupy by his authority. The adjudication in *Wheeler v. Earle*, 5 Cush. 31, 51 Am. Dec. 41, fully covers the ruling now in question.

The acceptance of rent already accrued, accompanied by an express agreement that the breach of condition was not thereby waived, did not affect the right of the lessor to enter for a breach of the condition: *Kimball v. Rowland*, 6 Gray, 224. There was nothing necessarily inconsistent between the acceptance of rent due and the enforcement of the right to enter. There was no error in the rulings at the trial.

Judgment for the defendant.

LANDLORD AND TENANT—WAIVER OF FORFEITURE OF LEASE.—An acceptance by a landlord of rent accruing after forfeiture, from a tenant, operates

as a waiver of the breach of the condition of a lease: *Gowder v. Hackatt*, 6 Wis. 323; 70 Am. Dec. 467; *Garhart v. Finney*, 40 Mo. 449; 93 Am. Dec. 303, and note. This question is fully discussed in the monographic note to *Moses v. Loomis*, ante, p. 194.

LEASE—EFFECT OF UNLAWFUL USE BY SUBLESSEE.—A subtenant's occupancy for an unlawful purpose is a breach of the lessee's covenant not to occupy or suffer the premises to be occupied for such purpose: *Wheeler v. Earle*, 5 Cush. 31; 51 Am. Dec. 41.

MARWICK v. ROGERS.

[163 MASSACHUSETTS, 50.]

SHIPPING—GENERAL AVERAGE.—The obligation to contribute to a general average loss, or to the general average expenses, springs from the law itself, and not from any contract between the parties concerned. It is a consequence of the common danger, where natural justice requires that all should contribute to indemnify for the loss of property which is sacrificed by one in order that the whole adventure may be saved.

SHIPPING.—THE OBLIGATION TO PAY GENERAL AVERAGE rests upon the vessel, the cargo, and the freight in proportion to their respective values, and upon the owners of each in proportion to the value of their property at risk, and may be enforced by resorting to the lien upon the property saved from the common peril, or by action against the persons bound to contribute.

SHIPPING—GENERAL AVERAGE.—THE OBLIGATION OF A CHARTERER OF A VESSEL WHO IS ALSO THE OWNER OF THE CARGO to contribute to the general average is not waived by a provision in the charter party that all liability of charterers under the agreement shall cease as soon as the cargo is shipped on board. All questions, whether of demurrage or otherwise, to be settled by the consignees, the owner and captain looking to their lien on the cargo for these purposes. This clause affects him in his capacity of charterer only.

P. B. Kiernan, for the plaintiff.

E. A. Upton, for the defendant.

50 BARKER, J. This suit is brought by the owners of a bark to recover of the defendant, who was the charterer of the vessel and also owner of her cargo, his share of general average expenses. The declaration alleges, in substance, that the plaintiffs are owners of the vessel, that they made a contract of charter party with the defendant to carry a general cargo of merchandise from Boston to Talcahuano; that in pursuance thereof the vessel was duly laden with a cargo owned by the defendant and sailed from port; that upon her voyage she sustained, from bad weather, heavy gales, and a heavy sea, damages by which it became ⁵¹ necessary to put into a

port of distress, where there were general average expenses amounting to the sum of sixteen hundred and ninety-five dollars and ninety-five cents, of which the cargo should bear its proportional part; that a certain proportion of this sum, but not the full amount, was thereafter paid by the owner of the cargo, which amount so paid the plaintiffs refused to receive in full settlement of the cargo's proportion of general average; that upon the arrival home of the vessel general average adjustments were duly made, in which the contribution of the cargo to the general average expenses amounted to the sum named, which sum was duly demanded of the defendant, who refused payment; and that at the time of the accident, and while the expenses were thus incurred, the defendant was the owner of the cargo. The charter party was not set out in the declaration, but, at the request of the defendant, a copy of it was subsequently filed, and it thus appeared that it contained the following stipulation or cesser clause: "It is further agreed that all liability of charterers under the agreement shall cease as soon as the cargo is shipped on board. All questions, whether of demurrage or otherwise, to be settled with the consignees, the owner and captain looking to their lien on cargo for this purpose." Thereafter the defendant demurred, on the ground that it appeared in the charter party that all his liability thereunder ceased as soon as the cargo was on board, and that all questions must be settled with the consignees, the owners and captain looking to their lien on cargo for this purpose, and that it appeared from the declaration that the alleged cause of action arose after the cargo had been shipped. This demurrer was sustained, and judgment ordered for the defendant, and the plaintiffs appealed to this court.

Upon the hearing of the appeal, the defendant, besides contending that he was freed by the clause quoted from any obligation to contribute personally to general average expenses, as the owner of the cargo or otherwise, also contended that it was implied by the declaration that there was an adjustment of the general average expenses at the port of distress, by which adjustment the plaintiffs were bound. But there is no allegation of such an adjustment, and the questions which might be raised if it had been pleaded are not open upon this demurrer. Nor is the question whether the clause quoted exonerates the defendant ⁵² from his obligation as owner of the cargo to contribute to general average

expenses raised in due course of pleading. The declaration, while alleging that the plaintiffs made a contract of charter party with the defendant, in pursuance of which the vessel was duly laden and sailed upon the voyage agreed upon, is not on the charter party, but is on an obligation imposed by law upon the defendant as owner of the cargo. The proper course for the defendant was not to craveoyer of the contract; but, if he relied upon its provisions in defense, to plead the charter party in his answer. If a correct course of pleading had been followed, the question of the effect of the stipulation upon the plaintiff's claim to contribution from the defendant as owner of the cargo would not have arisen until a later stage of the cause. But as the plaintiffs are content to accept and to argue the issue upon the pleadings as they stand, and as the decision of the question must be the same whether it is now dealt with or at a later stage of the cause, we have thought best now to dispose of it.

The obligation to contribute to a general average loss, or to general average expenses, springs from the law itself, and not from any contract between the parties concerned: See *Libby v. Gage*, 14 Allen, 261, 267, in which, after defining the obligation, Mr. Justice Gray says that those who are liable must contribute "in equity and justice, and by the express rule of the Rhodian law, preserved in the Pandects, from which the maritime law of all civilized nations on this subject is derived": See, also, *Burton v. English*, 12 Q. B. Div. 218, 220, where Lord Brett says of the obligation, "I do not think that it forms any part of the contract to carry, and that it does not arise from any contract at all, but from the old Rhodian laws, and has become incorporated into the law of England as the law of the ocean. It is not as a matter of contract, but in consequence of a common danger, where natural justice requires that all should contribute to indemnify for the loss of property which is sacrificed by one in order that the whole adventure may be saved. If this be so the liability to contribute does not arise out of any contract at all": See, also, *Sturgis v. Cary*, 2 Curt. 382, 384; *Anderson v. Ocean S. S. Co.*, 10 App. Cas. 107, 114; Abbott on Shipping, 13th ed., 626.

⁵³ The obligation rests upon the vessel, the cargo, and the freight, in proportion to their respective values, and upon the owners of each, in proportion to the value of their property at risk; and it may be enforced by resorting to a lien upon the

property saved from the common peril, or by action against the persons bound to contribute: See Abbott on Shipping, 13th ed., 657; *Anderson v. Ocean S. S. Co.*, 10 App. Cas. 107, 115.

The declaration, taken by itself, therefore, states a good cause of action, springing from the duty cast upon the defendant by the law to contribute in payment of general average expenses in proportion to the value of his cargo; and the question for decision is, whether the stipulation of the charter party frees him from this obligation. In the opinion of a majority of the court it does not.

It is to be observed that no explicit agreement of this charter party placed the defendant or his property in such a relation to the vessel or to the adventure that he was thereby rendered liable to general average contributions. Under no circumstances could the plaintiffs recover of him such a contribution by an action upon the charter party as a written agreement, the terms of which bound him to make such a contribution. He agreed to furnish the vessel a full cargo of lawful merchandise, to pay a stipulated sum for the charter or freight of the vessel during the voyage on the proper delivery of the cargo at the port of destination, and to pay demurrage at a stipulated rate in case the vessel should be detained longer than the agreed lay days, either in loading or discharging. But he made no advance payment of freight, and so did not become its owner in part or in whole, and he was not required to be the owner of any part of the cargo. There was nothing in his agreements which constituted him an owner either of cargo or of freight, or which required him to become such an owner, or which placed him in such a position as to make him liable to general average charges. As charterer he was not so liable. The duty rests only upon the owners of vessel, cargo, and freight; and he could perform all his agreements without incurring that obligation. His agreements to pay the freight, and to pay for the detention of the vessel at the port of discharge, could only be performed after the cargo was on board. These agreements ⁵⁴ were matters arising under the charter party itself, which afforded a field for the operation of the clause, the meaning of which is now in question, and its operation is naturally limited to that field. What the parties agree is, that all the defendant's liability under the charter party shall cease as soon as the cargo is shipped on board; and the final sentence, "All

questions, whether of demurrage or otherwise, to be settled with the consignees, the owner and captain looking to their lien on cargo for this purpose," is to be read in the light of this agreement. It does not extend the waiver of his liability, and is to be construed as dealing only with questions arising under the charter party. To give to the stipulation the meaning for which the defendant contends, and to construe it as releasing him from obligations which are not imposed by the charter party, but by the law itself, and which are incidental, not to his position as charterer, but to his ownership of the cargo, a relation as to which the charter party is silent, permitting him to furnish a cargo of which he may not be the owner, would be to strain the language of the contract, and to do violence to what we think, from the whole instrument, was the intention of the parties; namely, to free the charterer, upon his furnishing a full cargo, from possible liabilities cast upon him by the terms of the charter party, which, by its terms, he might otherwise personally be called upon to discharge after the full cargo had been shipped on board. By force of its provisions, although he had agreed in terms to make certain future payments if they should be earned by the vessel, he was exonerated from any personal obligation to make them when he had put a full cargo on board, and the owners of the vessel agreed in that case thereafter to look for those payments only to the cargo and to its consignees.

Such stipulations, or cesser clauses, are not unusual in charter parties, and questions of the obligation to pay freight, or demurrage, or damages for detention, when the charter party contains such a clause, have frequently been before the courts, especially in England: See Abbott on Shipping, 13th ed., 226-238, and cases there cited. So far as we are aware, the effect of such a stipulation upon the liability of a charterer to contribute as owner of cargo to a general average loss has not been considered by the English courts. But the case of *Gullischen v. Stewart*, 11 Q. B. Div. 186, ⁵⁵ 13 Q. B. Div. 317, holds that a cesser clause does not exonerate a charterer who is also consignee from a liability imposed upon him, not as charterer, but as consignee; and the charterer was there held liable as consignee, in respect of delay at the port of discharge, although it was stipulated by a cesser clause in the charter party that the charterer's liability should cease as soon as the cargo was on board. Since the argument, our

attention has been called to the case of *The Eliza Lines*, 61 Fed. Rep. 308, 325, in which the circuit court of the United States for the first circuit very recently has held that, if the charterer is also owner of the cargo under bills of lading, a cesser clause does not exonerate him from contributing to a general average loss.

It is possible that a charterer, by prepaying the freight, without a right to repayment in case of loss, or in other ways, may become in whole or in part its owner: See *Frayes v. Worms*, 19 Com. B., N. S., 159, 174, 175. Whether in such a case the cesser clause should exonerate him from contributing, as owner of freight, to a general average loss, we do not now decide. Such a liability, which, while imposed by the law, might be said to arise in consequence of the position in which the terms of the charter party place him as owner of freight, may perhaps be more readily considered as within the cesser clause, than his liability as owner of the cargo, a relation which he is not bound to take by virtue of any term of his contract. While it is plain that in any voyage general average losses or expenses may be incurred by some parties to the adventure, we are not able to assent to the conclusion that the liability to which they give rise is one which can fairly be impliedly written into every charter party, or one with which the cesser clause now in question was meant to deal. Unless in cases where, by the terms of the charter party, the charterer is put into such a relation to the other persons who are obliged to make or are entitled to receive contribution to a general average loss or to general average expenses that the necessary result of the contract is that he is liable to make such contribution if a general average loss occurs, we cannot assent to the doctrine that he is released by the cesser clause from an obligation which the law imposes, not because he is the charterer of the vessel, but because he is the owner of the cargo.

There are other considerations which tend to strengthen this ⁵⁶ conclusion. The duty which rests upon the parties concerned is one imposed by the law itself, and it is not a matter of course that one upon whom a duty is so cast may contract himself wholly out of the obligation, though he may stipulate for some other rule of adjustment than that of the place of the contract. Certainly an owner of cargo cannot by a contract with the owner of the vessel be relieved from this obligation to other owners of cargo or to other owners of

freight. By the necessity of the case, when a general average act is to be done it must be done by the authority of the master, who is selected and paid by the owners of the vessel, and who stands in a closer relation to them than to the owners of the cargo. Yet, in deciding upon the general average act, he is from necessity deemed to be the agent alike of the owners of the vessel, of the cargo, and of the freight; and the fact that the owner of the cargo is exonerated from contributing to make good the loss to be occasioned by the master's act may tend to bias him in his decisions, and so may unreasonably imperil the whole adventure. If the owner of the cargo is exonerated from contributing to general average losses he must also be held to have no right to claim such contribution from others, a consequence which is not to be implied from an agreement like the present charter party. Insurance of vessel, freight, and cargo has long been a usual incident of maritime adventures, and in case of an abandonment to the underwriters after a general average loss the insurers are substituted to the right of the assured to contribution for such losses. But the mutual relinquishment of the right of contribution by the owners of the vessel and of the cargo, or its relinquishment by either, may avoid insurance and prevent recourse to underwriters, a result which we cannot believe was contemplated by either party to the present charter: See *Schmidt v. Royal Mail S. S. Co.*, 45 L. J. Q. B. 646; *Crooks v. Allan*, 5 Q. B. Div. 38, 40. In the case last cited it was held that a stipulation inserted by the owners of a vessel in a bill of lading, to the effect that they were not to be liable for any damage which was capable of being covered by insurance, and which stipulation they contended had the effect to exonerate them and their vessel from liability to contribute to general average losses, did not so relieve them, because "the office of the bill of lading is to provide⁵⁷ for the rights and liabilities of the parties in reference to the contract to carry, and is not concerned with liabilities to contribution in general average, and unless the contrary appears, the words used must be so construed." The present case is so analogous to that decided in *Crooks v. Allan*, 5 Q. B. Div. 38, as to make that case an authority for the conclusion to which we have come. A charter party is no more concerned than is a bill of lading with liabilities growing out of general average, nor is there more reason for construing it as dealing with them, when it does not do so in express

terms. In *Clink v. Radford* (1891), 1 Q. B. 625, in holding that the cesser clause did not exempt the charterers from liability for delay at the port of loading, because no lien was given by the charter party for damages for such delay, it was said by Fry, L. J., that "the clause does not say that all the charterer's liability is to cease, nor simply the charterer's liability, but the charterer's liability under the charter party." See, also, *Dunlop v. Balfour* (1892), 1 Q. B. 507; *Hansen v. Harrold* (1894), 1 Q. B. 612. The charter party upon which the defendant relies was made by filling out a printed blank, as is commonly the case in making such instruments; and in construing it due regard should be given to the incidental effect which our construction may have upon the rights of other persons who make use of such blanks; and we think that in the mercantile world such cesser clauses have not been deemed to have any relation to questions of general average, or to do more than to regulate the liabilities of the charterer under the charter party.

We are aware that in the earlier decisions upon cesser clauses there are found general expressions to the effect that by their operation the charterer is exonerated from all future liability when the cargo is laden: See Abbott on Shipping, 13th ed., 226-238, and cases there cited. But the present English doctrine is that even as to breaches of the charter party itself the clause will be construed as inapplicable, if by construing it otherwise the shipowner would be left unprotected: See *Clink v. Radford* (1891), 1 Q. B. 625; *Dunlop v. Balfour* (1892), 1 Q. B. 507, *Hansen v. Harrold* (1894); 1 Q. B. 612.

And in the English cases generally it should be noticed that the courts were dealing with liabilities of the charterer as charterer, arising under the contract itself, and the general terms used in such decisions are to be qualified by that fact, and do ⁵⁸ not intend to hold that the charterer is exonerated from outside liabilities imposed upon him by the law, when he assumes, and because he assumes, an additional relation to the adventure as owner of the cargo.

In the opinion of a majority of the court the entry must be, judgment for defendant set aside and demurrer overruled.

MORTON, J., dissented. He insisted that charter-party contracts, being commercial contracts, should be construed, if possible, in harmony with mercantile usage and understanding, and where, as in this case, the question relates to a clause of a "peculiar character, the language of which

is not free from ambiguity, such a construction should be adopted, if it can be, as will be fair and reasonable, having regard to the mutual interest of the parties and to the main object of the contract:" *Dahl v. Nelson*, 6 App. Cas. 38, 59; *Orookewit v. Fletcher*, 26 L. J. Ex. 153, 159.

The introduction of cesser clauses in these contracts was due to the fact that frequently the charterer was only an agent "whose interest in the cargo ceased after it was shipped on board, or was a merchant who expected to dispose of the cargo while afloat, and both of whom naturally would desire to be relieved from liability to the shipowner for anything happening to the ship during the voyage." The more recent decisions in England indicate "that where the shipowner has a lien coextensive with the liability, which, for aught it appears, was the case here, the effect of the cesser clause will be to relieve the charterer": *Clink v. Radford* (1891), 1 Q. B. 625; *Dunlop v. Balfour* (1892), 1 Q. B. 507; *Hansen v. Harrold* (1894), 1 Q. B. 612.

The judge admitted the liability, independent of contract, to contribute to general average loss, but insisted that shipowners could by contract absolve charterers from this liability, and that the clause under consideration in this case showed an intention to release the charterer from this liability although he was also the owner of the cargo.

SHIPPING—GENERAL AVERAGE.—When the doctrine of general average will be applied is discussed in the extended note to *Walker v. United States Ins. Co.*, 14 Am. Dec. 613.

SHIPPING—GENERAL AVERAGE—CALCULATION OF.—If a fire in a vessel at a city wharf is extinguished by the city fire department acting under municipal authority, and not at the request or direction of the shipmaster, the cargo saved is not liable to contribute to a general average: *Wamsutta Mills v. Old Colony S. S. Co.*, 137 Mass. 471; 50 Am. Rep. 325.

LYNCH v. RICHARDSON.

[168 MASSACHUSETTS, 160.]

A LIVERY-STABLE KEEPER MUST TRY TO INFORM HIMSELF of the habits of horses kept in his stable for use in his business, and evidence to the effect that he had kept a horse in his use for one or two years, and that different persons who had never owned the horse knew of his viciousness, warrants the jury in finding that the viciousness was known to the owner, or that it could have been known to him had he exercised reasonable care.

A LIVERY-STABLE KEEPER IS LIABLE for injuries suffered by his customer from a horse that had the habit of viciously kicking and trying to run away when starting for home, if he knew of the existence of this habit, or by the exercise of reasonable care to ascertain whether the horse was suitable for the use of hirers, he ought to have known that it was dangerous.

TORT for personal injuries suffered from a horse let to the plaintiff's husband by the defendant, a livery-stable keeper. The testimony tended strongly to prove that the horse was a

vicious and dangerous animal, inclined at times to kick and run, and, while the plaintiff and other members of her family were driving it, and without any fault on her or their part, it commenced to run and kick, and continued to do so until the reins broke, and the carriage was upset, and the plaintiff injured. The trial judge nevertheless ruled that the plaintiff was not entitled to recover, because it did not appear that the defendant knew that the horse was vicious.

G. L. Mayberry, for the plaintiff.

B. B. Johnson, for the defendant.

¹⁶² KNOWLTON, J. The defendant was a keeper of a livery-stable, and the plaintiff's husband hired of him a horse and carriage for use by the plaintiff and other members of his family. The horse furnished under the contract was advanced in years, and there was evidence from which the jury might have found that it had long had a habit of viciously kicking and trying to run away when started for home, after having been kept out for a considerable time. There was also evidence tending to show that the plaintiff and her driver were free from fault, and in the exercise of due care. It was the duty of the defendant to furnish a horse that had no such vicious habit, and, ¹⁶³ if he knew of the existence of the habit, or if, by the exercise of reasonable care to ascertain whether the horse was suitable for the use of hirers, he ought to have known that it was dangerous, he is liable for such injuries as resulted from his wrongful conduct: *Horne v. Meakin*, 115 Mass. 326; *Copeland v. Draper*, 157 Mass. 558; 34 Am. St. Rep. 314.

A verdict was ordered for the defendant solely on the ground that there was no evidence that he knew of the viciousness of the horse. There was no direct evidence of such knowledge, but we think there was evidence from which the jury might well have inferred that he knew the facts. The evidence would have warranted the jury in believing that the habit was of such a kind as to be frequently manifested. It was the duty of the defendant to try to inform himself in regard to the habits of horses kept in his stable for use in his business. It does not require a very long acquaintance with a horse to enable an ordinary livery-stable keeper to form a correct opinion of its qualities. Usually he tries to ascertain as much as possible about it before becoming its owner. In

the present case the evidence indicates that different persons who never owned this horse knew of its viciousness before the defendant bought it. It does not very definitely appear how long the defendant had it before the accident, but there is evidence tending to show that it was between one and two years. Callaghan testified "that he had known the horse about three or four years; that it was owned by one Carney of Waltham, and by him sold to one McAuliffe, and by McAuliffe sold to the defendant; that he knew the horse while owned by Carney about a year and a half; and that McAuliffe owned it about six months, to the best of his knowledge and belief, before he sold it to the defendant." This evidence well warranted a finding without direct testimony that the defendant knew whether or not the horse had a vicious habit of running and kicking.

Exceptions sustained. —

LIVERY-STABLE KEEPER—LIABILITY FOR HIRING A VICIOUS HORSE. — A livery-stable keeper does not warrant or insure the suitableness of every horse he lets. Hence though he lets a horse to be ridden and it runs away and injures its rider, the latter cannot recover for such injury when the stable keeper has not been guilty of any negligence, and did not know of the horse having any defects or vicious habits: *Copeland v. Draper*, 157 Mass. 558; 34 Am. St. Rep. 314, and note.

SHEA v. GURNEY.

[163 MASSACHUSETTS, 184.]

LICENSEE—DUTY OF LANDOWNER. — A BOY WHO VISITS PREMISES where dangerous machinery is being operated, to amuse himself by riding in the teams and assisting the employees, is, at most, only a licensee and volunteer, to whom the owner of the premises and business owes no duty except to abstain from injuring him by active misconduct. Nor is it material that the boy acted under the direction of one of the employees.

TORT against Charles P. Slack & Co. for injury received by the plaintiff, a boy fourteen years of age, while assisting their workmen. These workmen were engaged in sawing wood, by placing it on a rocker and pushing it against a circular saw. The boy undertook the duty of taking the pieces of wood from the saw as they were cut, and of throwing them either upon the floor or into a wagon, and let his wrist come in contact with the saw, and thus received injury. He was

not employed by the defendants or the workmen, but was acting for his own amusement only. The trial judge ruled that the plaintiff could not recover.

L. E. Chamberlain and H. Kingman, for the plaintiff.

R. O. Harris and C. H. Edson, for the defendants.

¹⁸⁸ MORTON, J. The plaintiff was not in the employ of the defendants. He was not induced nor invited by them to enter their premises. He did not go there upon any matter of mutual interest to him or them, or upon any matter of business. He went there solely for his own amusement. At different times before the accident he had assisted workmen, including the one whom he was helping when the injury occurred, under such circumstances that the jury would have been warranted in finding that he was doing it with the knowledge of one or both of the defendants. Once or twice, as the testimony tended to show, when about the premises, he had been directed by Slack to load some boxes. And in the same afternoon, shortly before the accident happened, the testimony tended to show that Slack saw the plaintiff helping to load slabs into a wagon, to be taken to the sawhouse.

But as between the plaintiff and the defendants, notwithstanding these circumstances, he was at the most only a licensee and volunteer, visiting the premises to amuse himself by riding in the teams and by assisting the men. And as such the defendants owed him no duty except to abstain from injuring him by active misconduct on their part: *Zoebis v. Tarbell*, 10 Allen, 385, 386; 87 Am. Dec. 660; *Severy v. Nickerson*, 120 Mass. 306; 21 Am. Rep. 514; *Johnson v. Boston etc. R. R. Co.*, 125 Mass. 75; *Galligan v. Metacomet Mfg. Co.*, 143 Mass. 527; *Metcalfe v. Cunard S. S. Co.*, 147 Mass. 66; *Reardon v. Thompson*, 149 Mass. 267; *Daniels v. New York etc. R. R. Co.*, 154 Mass. 349; 26 Am. St. Rep. 253; *Billows v. Moors*, 162 Mass. 42.

We do not mean to intimate that the plaintiff was in the exercise of due care, even if he were to be regarded as the servant of the defendants.

The direction by the workman, Arsenal, does not help the plaintiff: *Flower v. Pennsylvania R. R. Co.*, 69 Pa. St. 210; 8 Am. Rep. 251; *New Orleans etc. R. R. Co. v. Harrison*, 48 Miss. 112; 12 Am. Rep. 356; *Howard v. Hood*, 155 Mass. 891.

Exceptions overruled.

REAL PROPERTY—DUTY TO INFANT LICENSEES.—If an infant trespasses on the premises of another, and is injured by something which he does while so trespassing, he cannot recover of the owner of the premises unless the injury was wantonly inflicted or was due to his recklessly careless conduct: *McGuinness v. Butler*, 159 Mass. 233; 38 Am. St. Rep. 412, and note. Though a child of tender years meeting with injury on the premises of a private owner is a technical trespasser, yet the owner is liable if the things causing the injury have been left exposed and unguarded, and are of such a character as to be an attraction to a child: *City of Pekin v. McMahon*, 154 Ill. 141; 45 Am. St. Rep. 114, and note; *Brinkley Car Co. v. Cooper*, 60 Ark. 545; 46 Am. St. Rep. 216.

DOVER STAMPING COMPANY v. FELLOWS.

[163 MASSACHUSETTS, 191.]

TRADEMARKS—PATENTED ARTICLES. — One who has obtained the protection afforded by a patent must yield up his monopoly with all that belongs to it at the end of the term. The right to the exclusive use of the name given to his goods, which may have otherwise become a trademark, will ordinarily fall with the patent itself.

TRADEMARKS—WHEN THE MANUFACTURER OF A PATENTED ARTICLE CALLS IT BY A NAME by which and by no other name it becomes known to the trade, the right to the exclusive use of that name ceases with the expiration of the patent. Therefore, if a particular patented eggbeater is known by the name of "Dover," and the patent expires, any person may make an eggbeater of the same character and call it by the same name, unless he also does something to indicate that it is made by some other person.

TRADEMARK OR NAME. — ONE MAY COPY WITH EXACTNESS WHAT ANOTHER HAS PRODUCED without inflicting legal injury, unless he attributes to what he has made a false origin by claiming it to be the manufacture of some other person. Hence, when a patent expires, any person may make the article in the same form in which it was made by the patentee, and put it on the market for sale, and his so doing is not an invasion of a trade-mark or name, though he also calls the article by the name by which it was known when its manufacture and sale were protected by patent.

BILL of equity to enjoin the name of "Dover" as applied to eggbeaters.

T. W. Clarke, for the plaintiff.

E. S. Beach, for the defendants.

193 ALLEN, J. This case comes up on a report of the evidence, without any findings of the facts. We have therefore in the first place to determine and state the material facts shown by the evidence, and then to determine the rules of law applicable to the facts.

In 1857 a partnership or company was established under

the name of the "Dover Stamping Company," which in 1871 was organized as a corporation under the laws of this commonwealth, having its usual place of business in Boston and its factory in Cambridge. This company, both before and after its organization as a corporation, may, for convenience be called the plaintiff. It manufactured and dealt in kitchen furnishing goods and tinware. On May 31, 1870, one Turner Williams obtained letters patent for an improved egg beater, the essential principle of which consisted in having two interworking or interlacing floats or beaters, revolving in opposite directions on separate centers, and occupying the same working space. The plaintiff dealt in eggbeaters of different kinds, and in 1870 obtained control of the Williams patent, and as early as 1872 became the owner of it. In 1870 the plaintiff contracted with the Lamb Knitting Machine Manufacturing Company for the manufacture of eggbeaters under the Williams patent, and also of other kinds of egg beaters. To the eggbeaters under the Williams patent the plaintiff gave the name of "Dover," and on October 31, 1870, directed the Lamb company to put on the wheel of the egg beaters the words and figures, "Dover Egg ¹⁸⁷⁰ Beater, Pat'd May 31st, 1870." This was done. On May 6, 1873, one Ethan Hadley obtained letters patent for an improvement in egg beaters. In his specification he said: "My invention relates to an improvement in what is known as the Dover egg beater," and in his claim he spoke of his invention as "an improvement on the Dover egg beater." This invention was assigned to the plaintiff. The Lamb company continued to be the exclusive manufacturer of the Dover egg beaters for the plaintiff under these patents until the expiration of the last patent in 1890. These egg beaters were made in three sizes. The ordinary size, adapted for family use, constituted ninety-eight or ninety-nine per cent of the whole manufacture. The largest size was sometimes called the "mammoth" or "hotel" size; of these perhaps one thousand were made in all. The second largest size was called the "extra family size," and perhaps ten times as many of these were made as of the hotel size. The whole number of Dover egg beaters of all sizes made for the plaintiff by the Lamb company was about four million. These egg beaters were known by the trade and by the public as "Dover" egg beaters. They were spoken of and bought and sold under that name, and they had no other name. The name "Dover" was used to signify

and indicate this article; and there was no other usual short way in which to describe it. "Dover" was the name by which they were universally known. This name signified the above-mentioned combination of floats or beaters, propelled by a wheel and handle. The improvement patented by Hadley, and various unpatented improvements which were made from time to time, were not essential features of the machine, but were rather changes and improvements in mechanical details, not affecting the principle or the general mode of construction. Some stress has been laid on these changes in the argument for the plaintiff, but they appear to us insufficient to show that the word "Dover" meant to dealers or to the public anything else than egg beaters of that general construction and appearance. From the outset the general construction and appearance remained about the same, only there were some changes in mechanical details which were not distinguishing characteristics of the article.

Since 1875 various other articles manufactured or sold by the ¹⁸⁷⁴ plaintiff have been named or called "Dover," as, for instance, "Dover can-spouts," "Dover teakettles," "Dover coal-hods," etc. The plaintiff's machines were all marked "Dover Egg Beater," with dates of patents, in which last particular there was some change after the Hadley patent was obtained. The defendants' machines which are complained of were marked simply "Dover," with dates of other patents. The defendants' mode of packing the goods had been in use before the Williams patent was obtained.

The plaintiff contends, in the first place, that the word "Dover," as applied to egg beaters, is a trademark, and that it is entitled to be protected in the exclusive use of that word. The defendants deny that the plaintiff could acquire a valid trademark in the word "Dover" under any circumstances: *Columbia Mill Co. v. Alcorn*, 150 U. S. 460; *Sebastian on Trademarks*, 82, and cases cited. But it is enough for us to inquire whether the plaintiff has done so under the particular circumstances of this case.

A word which might become a valid trademark when applied to an unpatented article may not be so when applied to an article which has the protection of letters patent. In the latter case the letters patent indicate the ownership and origin of the article, and it is more readily to be inferred that the word is used as a name merely to identify the article. Usually the protection given by a patent is far greater, though

of less duration in time, than that obtained by the use of a trademark; because if an article is patented, nobody but the owner of the patent can, without his consent, make or sell anything embodying the same principles or elements, while a trademark only secures one in the use of the name or emblem adopted by him and applied to the article: Sebastian on Trademarks, 15. One may choose to rely on the name alone, and if so, he may establish or create a trade-mark which will be permanent. But if he seeks and obtains the protection afforded by a patent, he is bound to yield up his monopoly with all that belongs to it at the end of the term, and the right to the exclusive use of the name given to his goods, which might otherwise have become a trademark, will ordinarily fall with the patent itself. It is sometimes said that the granting of a patent is a contract with two sides to it; ¹⁹⁵ that the government grants an exclusive use for a term of years, and the patentee agrees to surrender that use fully and freely for the general benefit of the public at the end of that term; and that this contract is to be liberally construed in favor of the patentee during the term, and in like manner liberally construed in favor of the public after the term has expired: Robinson on Patents, secs. 40, 44. This, at any rate, describes with substantial accuracy the resulting rights of the parties. After the expiration of a patent the public is entitled to make and use the patented article, free from restrictions; and this right carries with it whatever is necessary for its full enjoyment.

In *Cheavin v. Walker*, 5 Ch. Div. 850, 862, it was said by Jessel, M. R: "Protection only extends to the time allowed by the statute for the patent, and if the court were afterward to protect the use of the word as a trademark, it would be in fact extending the time for protection given by the statute, It is, therefore, impossible to allow a man who has once had the protection of a patent to obtain a further protection by using the name of his patent as a trademark." And in the same case, James, L. J., said: "It is impossible to allow a man to prolong his monopoly by trying to turn a description of the article into a trademark. Whatever is mere description is open to all the world." In *In re Palmer's Trademark*, 24 Ch. Div. 504, 521, Lindley, L. J., said: "I do not mean to say that a manufacturer of a patented article cannot have a trademark not descriptive of the patented article so as to be entitled to the exclusive use of that mark after the patent has

expired; for instance, if he impressed on the patented articles a griffin, or some other device; but if his only trademark is a word or set of words descriptive of the patented article of which he is the only maker, it appears to me to be impossible for him ever to make out as a matter of fact that this mark denotes him as the maker as distinguished from other makers." And in *In re Leonard & Ellis' Trademark*, 26 Ch. Div. 288, 303, 304, after an elaborate exposition by Lord Chancellor Selborne, it was said by Cotton, L. J: "If a man has a patent, and during the term of his patent is the only maker of an article to which he gives a particular name, which name during the continuance of the patent comes to be merely a description of the article, he cannot, in my opinion, after his patent is gone, and the making ¹⁹⁶ of the article is free and open to all the world, claim the name as his trademark."

In the present case, it is not necessary for us to go so far as to say that where there is a patent there can be no trademark, especially where some special device or symbol is added to the general name of the article manufactured. But where one who has a patented article gives to it and puts upon it a name, and calls it by that name and by no other, and it becomes known to the trade and to the public exclusively by the name so given to it by the patentee or person controlling the patent, then certainly it may be said that, as a general rule, the right to the exclusive use of the name ceases with the termination of the exclusive right to make and sell the thing. This is shown by numerous decisions in England and in this country: *Linoleum Mfg. Co. v. Nairn*, 7 Ch. Div. 884; *Wheeler & Wilson Mfg. Co. v. Shakespear*, 39 L. J. Ch. 88; *Young v. Macrae*, 9 Jur., N. S., 322; *In re Palmer's Trademark*, 24 Ch. Div. 504, 517, 520, 521; *In re Leonard & Ellis' Trademark*, 26 Ch. Div. 288; *Singer Mfg. Co. v. Stange*, 6 Fed. Rep. 279; *Singer Mfg. Co. v. Riley*, 11 Fed. Rep. 706; *Singer Mfg. Co. v. Larsen*, 8 Biss. 151; *Singer Mfg. Co. v. June Mfg. Co.*, 41 Fed. Rep. 208; *Brill v. Singer Mfg. Co.*, 41 Ohio St. 127; 52 Am. Rep. 74; *Tucker Mfg. Co. v. Boyington*, Fed. Cas. No. 14229, 9 U. S. Pat. Gaz. 455; *In re Consolidated Fruit Jar Co.*, 14 U. S. Pat. Gaz. 269; *Lorillard v. Pride*, 28 Fed. Rep. 434; *Gally v. Colt's Patent Fire Arms Mfg. Co.*, 30 Fed. Rep. 118; *Coats v. Merrick Thread Co.*, 36 Fed. Rep. 324; *Hiram Holt Co. v. Wadsworth*, 41 Fed. Rep. 24. The inclination of courts to treat a name so used as

merely the name of the goods, and not as denoting any connection between them and the trader, is mentioned by the text-writers: Kerly on Trademarks, 40-42, 201, 202, 405; Sebastian on Trademarks, 59-61. See, also, Browne on Trademarks, secs. 220 a, 221.

If therefore we should assume that there may be a double use of a word like "Dover," and that it may be used both as the name of the patented article and as a trademark, then it would be necessary to see if in this case there was sufficient evidence to show that the plaintiff so used it as to import a trademark as well as the name of the patented article, and also that the defendants have used it in a like double sense. Since, ordinarily,¹⁹⁷ the exclusive right to use the name ceases with the expiration of the patent, there must at least be something to show some special and distinguishing use, by which it can be seen and known that the word is not used merely as the name of a thing, but to import the additional feature of a trademark: *In re Leonard & Ellis' Trademark*, 26 Ch. Div. 288, 296, 298. There is nothing to show that the plaintiff ever had this distinction in mind, or used the word in any other manner than merely as the name given to the egg beaters. Nor, on the other hand, is there anything to show that the defendants, since the expiration of the patent, have used the word in any other sense than to call the machine by its name. This they have a right to do; and to entitle the plaintiff to an injunction it must be shown that the defendants have used the word in a further sense, so as to violate the plaintiff's right of trademark, while using the word "Dover" as the name of the machine, as they lawfully may do; and any injunction which might be granted would have to be so limited as not to prohibit the defendants from calling the egg beaters by their name. The distinction is fine, perhaps too fine for practical application. In this case we are not satisfied, on the evidence, that the plaintiff has any trademark in the name "Dover." A mere name is often held to be simply descriptive of the article which is called and known by it and by no other name, and it may be assignable to others, even though it is the name of the inventor, or original manufacturer, or dealer himself: *Thomson v. Winchester*, 19 Pick. 214; 31 Am. Dec. 185; *Gilman v. Hunnewell*, 122 Mass. 139; *Russia Cement Co. v. Le Page*, 147 Mass. 206; 9 Am. St. Rep. 685, and cases there cited; *Noera v. Williams Mfg. Co.*, 158 Mass. 110. See,

also, *Columbia Mill Co. v. Alcorn*, 150 U. S. 460; *Hall v. Barrows*, 4 De Gex, J. & S. 150. The word "Dover" has by use thus come to be simply descriptive of an egg beater made under the Williams patent, and it became common to the public on the expiration of that patent.

The plaintiff contends that it has a right to protection under Public Statutes, chapter 76, section 1, providing that trademarks are not to be used without the consent of their owner. But the plaintiff derives no additional rights under this provision of statute, because the word "Dover" was used as the name of the machines, and not as a trademark, and it was not the intention of the ¹⁹⁸ statute to do away with the rule that the name of a patented article becomes open to general use upon the expiration of the patent. This rule has heretofore been incidentally alluded to in a way to imply that it was understood to be in force in this commonwealth: *American Order of Scottish Clans v. Merrill*, 151 Mass. 558, 562; *Chadwick v. Covell*, 151 Mass. 190, 195; 21 Am. St. Rep. 442.

The plaintiff further contends that the defendants have used the word "Dover" as a mark on their egg beaters in a way calculated to deceive the public, independently of the question of the trademark. This, according to the contention of the plaintiff, means that they are passing off their goods as goods made for or by the plaintiff, and thus are injuring the plaintiff by unfair competition. No doubt the use of the word "Dover" on the egg beaters is an advantage in the market; but this is an advantage which the defendants are entitled to have, unless the plaintiff has a valid trademark. It must now be assumed that the plaintiff has no trademark in the name, and that the name, as well as the invention, is open to common use. This being so, something more must be shown than merely that the defendants are making and selling egg beaters similar in kind to those of the plaintiff, and under the same name: *Magee Furnace Co. v. Le Barron*, 127 Mass. 115; *Brill v. Singer Mfg. Co.*, 41 Ohio St. 127; 52 Am. Rep. 74; *Singer Mfg. Co. v. Riley*, 11 Fed. Rep. 706; *In re Leonard & Ellis' Trademark*, 26 Ch. Div. 288; *In re Ralph's Trademark*, 25 Ch. Div. 194, 198; *Singer Mfg. Co. v. Loog*, 8 App. Cas. 15. The evidence fails to show any violation of the plaintiff's rights in this respect. There is nothing in the making of the defendants' egg beaters to indicate that they were made by the plaintiff, unless the use

of the word "Dover" on the wheel. The defendants had a right to put this marking on the wheel. In form and construction and general appearance there was some resemblance between the defendants' egg beaters and the plaintiff's; but imitation in these respects is lawful. In *Fairbanks v. Jacobus*, 14 Blatch. C. C. 337, it was held that, apart from patents and trademarks, "Any one may make anything in any form, and may copy with exactness that which another has produced, without inflicting any legal injury, unless he attributes to that which he has made a false origin, by claiming it to be the manufacture of another person." This was ¹⁹⁹ cited and approved in *Brill v. Singer Mfg. Co.*, 41 Ohio St. 127, 138, 52 Am. Rep. 74, where it was held broadly that "where machines, during the time they are protected by a patent, become known and identified in the trade by their shape, external appearance, or ornamentation, the patentee, after the expiration of the patent, cannot prevent others from using the same modes of identification in machines of the same kind manufactured and sold by them." And in *Singer Mfg. Co. v. June Mfg. Co.*, 41 Fed. Rep. 208, the above doctrines were reaffirmed with distinctness and emphasis. There is no unfair competition, apart from the infringement of a patent or trademark, unless the competing person so makes or marks his goods or conducts his business that purchasers of ordinary caution and prudence, and not those who are exceptionally dull, are likely to be misled into the belief that his goods are the goods of somebody else: *Gilman v. Hunnewell*, 122 Mass. 139, 148-150; *Singer Mfg. Co. v. Wilson*, 2 Ch. Div. 434, 447, per Jessel, M. R., whose decree was affirmed on appeal; *Brill v. Singer Mfg. Co.*, 41 Ohio St. 127; 52 Am. Rep. 74; *Robertson v. Berry*, 50 Md. 591; 33 Am. Rep. 328.

Looking at the whole case in the light of the defendants' right to use the word "Dover" and to make egg beaters similar in construction and general appearance to those of the plaintiff, we find no proof of anything unlawful on their part.

Bill dismissed.

PATENTS—USE AFTER EXPIRATION.—The use of patterns surreptitiously copied from patterns used by an inventor in casting a pump, the patent to which has expired, will be enjoined when such patterns have been copied without the assent of the inventor and they cannot be duplicated merely by measuring the pump: *Tabor v. Hoffman*, 118 N. Y. 30; 16 Am. St. Rep. 740, and note. See the discussion of this subject contained in the extended note to *McCay v. Burr*, 47 Am. Dec. 443.

EMERY v. BURBANK.

[108 MASSACHUSETTS, 326.]

CONFLICT OF LAWS.—A CONTRACT VALID WHERE MADE IS VALID EVERYWHERE, but is not necessarily enforceable everywhere.

CONFLICT OF LAWS.—CONTRACT VALID WHERE MADE, WHEN WILL BE DENIED ENFORCEMENT ELSEWHERE.—A contract made in Maine, to the effect that upon the doing of certain things the person for whom they were to be done will make a will in favor of the other contracting party, cannot be enforced in Massachusetts unless in writing. The statute of the latter state declaring that no agreement to make a will shall be binding unless in writing embodies a fundamental policy and forbids that testators should be sued in that state upon such contracts without written evidence, wherever they are made.

E. Greenwood, for the plaintiff.

A. Hemeway and H. C. Mulligan, for the defendant.

327 HOLMES, J. This is an action on an oral agreement, alleged to have been made in Maine in 1890 by the defendant's testatrix, Mrs. Rumery, to the effect that, if the plaintiff would leave Maine and take care of Mrs. Rumery, the latter would leave the plaintiff all her property at her death, and also would put four thousand dollars into a house which the plaintiff should have. At the trial evidence was introduced tending to prove the agreement as alleged. The presiding justice ruled that the action could not be maintained, and the case is here on exceptions. As we are of opinion that the ruling must be sustained under the statutes of 1888, chapter 872, requiring agreements to make wills to be in writing, a fuller statement of the facts is not needful.

There is no doubt of the general principles to be applied. A contract valid where it is made is valid everywhere, but it is not necessarily enforceable everywhere. It may be contrary to the policy of the law of the forum: *Van Reimsdyk v. Kane*, 1 Gall. 371, 375; *Greenwood v. Curtis*, 6 Mass. 358; 4 Am. Dec. 145; *Fant v. Miller*, 17 Gratt. 47, 62. Or again, if the law of the forum requires a certain mode of proof, the contract, although valid, cannot be enforced in that jurisdiction without the proof required there. This is as true between the states of this Union as it is between Massachusetts and England: *Hoadley v. Northern Transp. Co.*, 115 Mass. 304, 306; 15 Am. Rep. 106; *Pritchard v. Norton*, 106 U. S. 124, 134; *Downer v. Chesebrough*, 36 Conn. 39; 4 Am. Rep. 29; *Kleeman v. Collins*, 9 Bush, 460; *Fant v. Miller*, 17 Gratt. 47; *Hunt v. Jones*, 12 R. I. 265, 266; 34 Am. Rep. 635; *Yates v.*

Thomson, 3 Clark & F. 544, 586, 587; *Bain v. Whitehaven etc. Ry. Co.*, 3 H. L. Cas. 1, 19; *Leroux v. Brown*, 12 Com. B. 801. When the law involved is a statute, it is a question of construction whether the law is addressed to the necessary constituent elements or legality of the contract on the one hand, or to the evidence by which it shall be proved on the other. In the former case the law affects contracts made within the jurisdiction wherever sued, and may ~~also~~ affect only them: *Drew v. Smith*, 59 Me. 393. In the latter it applies to all suits within the jurisdiction wherever the contracts sued upon were made, and again may have no other effect. It is possible, however, that a statute should affect both validity and remedy by express words, and this being so, it is possible that words which in terms speak only of one should carry with them an implication also as to the other. For instance, in a well-known English case, Maule, J., said: "The fourth section of the statute of frauds entirely applies to procedure." And on this ground it was held that an action could not be maintained upon an oral contract made in France. But he went on: "It may be that the words used, operating on contracts made in England, renders them void": *Leroux v. Brown*, 12 Com. B. 801, 805, 827. We cite the language, not for its particular application, but as a recognition of the possibility which we assert.

The words of the statute before us seem in the first place, and most plainly, to deal with the validity and form of the contract. "No agreement . . . shall be binding, unless such agreement is in writing." If taken literally, they are not satisfied by a written memorandum of the contract; the contract itself must be made in writing. They are limited, too, to agreements made after the passage of the act, a limitation which perhaps would be more likely to be inserted in a law concerning the form of a contract than in one which only changed a rule of evidence. But we are of opinion that the statute ought not to be limited to its operation on the form of contracts made in this state. The generality of the words alone, "no agreement," is not conclusive. But the statute evidently embodies a fundamental policy. The ground, of course, is the prevention of fraud and perjury, which are deemed likely to be practiced without this safeguard. The nature of the contract is such that it naturally would be performed or sued upon at the domicile of the promisor. If the policy of Massachusetts makes void an

oral contract of this sort made within the state, the same policy forbids that Massachusetts testators should be sued here upon such contracts without written evidence, wherever they are made.

If we are right in our understanding of the policy established by the legislature, it is our duty to carry it out so far as we can do so without coming into conflict with paramount principles. ³²⁹ "If oral evidence were offered which the *lex fori* excluded, such exclusion, being founded on the desire of preventing perjury, might claim to override any contrary rule of the *lex loci contractus*, not only on the ground of its being a question of procedure, but also because of that reservation in favor of any stringent domestic policy which controls all maxims of private international law": Westlake on Private International Law, 3d ed., sec. 208; Wharton on Conflict of Laws, 2d ed., sec. 766.

In our view, the statute, whatever it expresses, implies a rule of procedure broad enough to cover this case. It is not necessary to decide exactly how broad the rule may be—whether, for instance, if, by some unusual chance, a suit should happen to be brought here against an ancillary administrator upon a contract made in another state by one of its inhabitants, the contract would have to be in writing. The rule extends at least to contracts by Massachusetts testators. It might be possible to treat the words "signed by the party whose executor or administrator is sought to be charged," as meaning "signed by the party whose executor or administrator is sought to be charged in Massachusetts," and to construe the whole statute as directed only to procedure: Compare *Fant v. Miller*, 17 Gratt. 47, 72, et seq; *Denny v. Williams*, 5 Allen, 1, 3, 9. Upon this question also we express no opinion. All that we decide is that the statute does apply to a case like the present.

The law of the testator's domicile is the law of the will. A contract to make a will means an effectual will, and therefore a will good by the law of the domicile. In a sense, the place of performance, as well as the forum for a suit in case of breach, is the domicile. We do not draw the conclusion that therefore the validity of all such contracts, wherever sued on, must depend on the law of the domicile. That would leave many such contracts in a state of indeterminate validity until the testator's death, as he may change his domicile so long as he can travel. But the consideration shows that the

final domicile is more concerned in the policy to be insisted on than any other jurisdiction, and justifies it in framing its rules accordingly. There would be no question to be argued if the law were in terms a rule of evidence. It is equally open for a state to declare, upon the same considerations which dictate a rule of evidence, that a contract ³³⁰ must have certain form if it is to be enforced against its inhabitants in its courts. Legislation of this kind for contracts which thus necessarily reach into the jurisdiction in their operation hardly goes as far as statutes dealing with substantive liability which have been upheld: *Commonwealth v. Macloon*, 101 Mass. 1; 100 Am. Dec. 89.

If the statute applies, the fact that the plaintiff has furnished the stipulated consideration will not prevent its application.

Exceptions overruled.

CONTRACTS—LAW OF PLACE.—A contract valid where made is valid everywhere as to matters bearing upon its execution, interpretation, and validity: *Armstrong v. Best*, 112 N. C. 59; 34 Am. St. Rep. 473, and note. This question is fully discussed in the notes to *Robinson v. Queen*, 10 Am. St. Rep. 698, and *Graves v. Johnson*, 32 Am. St. Rep. 450; and the extended note to *Ruhe v. Buck*, 46 Am. St. Rep. 448.

CONTRACTS—CONFLICT OF LAWS—ENFORCEMENT.—Matters connected with the performance of a contract are regulated by the law prevailing at the place of performance: *Waverly Nat. Bank v. Hall*, 150 Pa. St. 466; 30 Am. St. Rep. 823, and note. A contract valid where made is generally valid elsewhere; but to this rule there is the exception that no state or nation is bound to recognize or enforce contracts which are injurious to its own interests or the welfare of its people, or which are in violation of its own laws: *Wasserbocher v. Boulter*, 84 Me. 165; 30 Am. St. Rep. 344, and note.

PATTEE v. PAIGE.

[163 MASSACHUSETTS, 352.]

CONFLICT OF LAWS—INSOLVENCY.—A NONRESIDENT CREDITOR is not barred by a discharge in insolvency granted here unless he has come in and submitted himself to the jurisdiction of the court. If he thus comes in and proves his claim and takes a dividend on it, or if he accepts a sum offered under composition proceedings, he is held to have waived his right of objection.

CONFLICT OF LAWS—INSOLVENCY PROCEEDINGS.—A NONRESIDENT CREDITOR HAVING A CLAIM AGAINST TWO INSOLVENT FIRMS, both included in the same proceedings in insolvency, one consisting of two members, and the other of the same two members and a third, who proves his claim against the latter firm, votes for an assignee, and receives a dividend, is not precluded from maintaining an action against the other firm upon the demand against it.

ACTION upon a promissory note executed by the defendants, Paige and Gove. For a defense they relied upon certain proceedings in insolvency as expressed in the opinion of the court. This defense, having been overruled by the trial judge, the defendants appealed.

G. A. Blaney & S. Robinson, for the defendants.

F. H. Williams & F. M. Copeland, for the plaintiff.

353 ALLEN, J. It is well settled and familiar that a non-resident creditor is not barred of his claim by a discharge in insolvency granted here, unless he has come in and submitted himself to the jurisdiction of the court: *Phoenix Nat. Bank v. Batcheller*, 151 Mass. 589. If he thus comes in and proves his claim and takes a dividend, or if he accepts the sum offered under composition proceedings, he is held to have waived this right of objection: *Murray v. Roberts*, 150 Mass. 858; 15 Am. St. Rep. 209; *Eustis v. Bolles*, 146 Mass. 418; 4 Am. St. Rep. 327; 150 U. S. 361.

In the present case there were two firms, Paige & Gove and Crosby, Paige & Gove. The latter firm consisted of the members of the former firm with the addition of Crosby. Both firms were included in the same proceedings in insolvency, and the plaintiff, a nonresident, held a claim against each firm. He proved only the claim against Crosby, Paige & Gove, and voted thereon for assignee and took a dividend therein. It is not stated whether his vote affected the choice of assignee or not. The question is, whether his claim against the other firm and its members is thereby barred, a discharge having been granted to the debtors.

No objection has been raised to the method of including both firms in the same proceedings in insolvency. There was nothing beyond the facts already stated to show an intention on the part of the plaintiff to waive his right to pursue his present claim by an action at law.

The statutes do not, in terms, provide for a case where the same persons are members of more than one firm. In England a practice grew up by which a commission in bankruptcy against several partners would include not only the individual members, but all minor partnerships existing amongst them as well, distinct accounts being kept. Under this practice, a general order was passed by Lord Rosslyn, in 1794, that under a joint commission against a firm separate

debts might be proved as of course, without filing a special petition for liberty to do so: 2 Christian's Bankrupt Law, 2d ed., 31, 32. And it was held that creditors of a minor firm consisting of some of the members of the larger ²⁵⁴ firm might, in like manner, prove their claims: *Ex parte Worthington*, 3 Madd. 26. But a creditor whose claim was against the firm and also against one or more of its members could not make double proof, even though the obligation was created by different instruments: *Ex parte Bevan*, 10 Ves. 107; Robson on Bankruptcy Practice, 726-728. This, however, was altered by the bankruptcy acts of 1861 and 1883, so that double proof might be made; and it was held that the fact that an individual partner had given security for the debt could not prevent the creditor from proving against the firm without giving up his security, the reason being that the joint and separate estates are considered in the administration of the property in bankruptcy as distinct estates: Robson on Bankruptcy Practice, 729-731, and cases cited.

In Massachusetts double proof is allowed, without any express statute authorizing it: *Roger Williams Nat. Bank v. Hall*, 160 Mass. 171. And although the proceedings are joint, this is rather as a matter of convenience. It was held in England that the jurisdiction to supersede prior proceedings against one partner, upon the institution of proceedings which embraced the firm, was entirely discretionary, and would be determined by considerations of convenience: *Ex parte Rowlandson*, 1 Rose, 416; Robson on Bankruptcy Practice, 687. The practice in this country seems to have been the same: *In re Mitchell*, 3 Nat. Bank. Reg. 441; *In re Stevens*, 5 Nat. Bank. Reg. 112; 1 Saw. 397. And where one of the partners of a bankrupt firm was also a member of another firm which had a claim against the bankrupt firm, the claim was allowed to be proved, the two firms being regarded as distinct legal entities, capable of contracting with each other in equity: *In re Buckhause*, 2 Low. 331; 10 Nat. Bank. Reg. 206. In the present case, the transactions of the different firms were distinct, and for most purposes the estates are also considered as distinct. The plaintiff's claim against the defendants is not the same as that which he proved in insolvency. And we are of opinion that the waiver which is implied by his act of proving a claim against one of the partnerships does not extend to his claim against the other.

Merely proving the claim of itself signifies but little. A

claim, after being proved and allowed, may be withdrawn by leave of court, and, being so withdrawn, no consequence follows ³⁵⁵ from the fact of its having been so proved: *Morse v. Lowell*, 7 Met. 152; *Safford v. Slade*, 11 Cush. 29; *Franklin County Nat. Bank v. Greenfield Bank*, 138 Mass. 515, 526; *Nichols v. Smith*, 143 Mass. 455. In *Bemis v. Smith*, 10 Met. 194, it was held to be the right of a creditor, under the circumstances there shown, to withdraw his proof without leave of court, in order to use his claim by way of setoff.

The fact of a creditor's having voted for assignee, and even of having by his vote controlled the choice, settles nothing conclusively. After having done so, he may still, by leave of court, withdraw the claim so voted upon, in order to avail himself of advantages which he would lose if the proof stood: *Franklin County Nat. Bank v. Greenfield Bank*, 138 Mass. 515; *Nichols v. Smith*, 143 Mass. 455.

The taking of a dividend by the plaintiff upon his claim against one firm ought not to affect his claim against the other firm. No decision has come to our notice where this question has been determined. We need not consider how it would be if both claims were against the same firm or the same individual, and only one of them was proved; or if a creditor held two claims, one fiduciary and the other not, and only proved the latter. We limit ourselves to the question which is now presented. If two firms consisting in part of the same members are included in the same proceedings in insolvency, and a nonresident creditor holds a claim against each firm, and proves against only one of them, and votes for assignee, and takes a dividend thereon, the granting of a discharge to the debtors will not debar him from subsequently maintaining an action upon the other claim.

For these reasons, in the opinion of a majority of the court, the entry must be, judgment for the plaintiff affirmed.

INSOLVENCY—DISCHARGE IN—EFFECT ON NONRESIDENT CREDITOR.—A discharge by a state court of an insolvent from his debts cannot affect a creditor who was a nonresident of the state when the insolvency proceedings were begun, though he was a resident thereof when the debt was contracted, unless he proved his claim in the insolvency court, or otherwise appeared therein. Because the insolvency court did not have jurisdiction over him, it could not discharge his right of action to recover his debt: *Pullen v. Hillman*, 84 Me. 129; 30 Am. St. Rep. 340, and note. A full discussion of this subject is contained in the extended note to *Murray v. Roberts*, 15 Am. St. Rep. 212-221.

ATWELL v. JENKINS.

[163 MASSACHUSETTS, 362.]

INSANE PERSONS, DISAFFIRMING CONTRACT WITH.—One contracting with an insane person has no right to disaffirm or avoid the contract, though not aware of the insanity at the time of contracting. The right to avoid is for the personal protection of the lunatic, and those who deal with him have no corresponding right, unless they have been misled by fraudulent misrepresentations.

C. W. Clark, for the plaintiff.

P. J. Casey, for the defendant.

362 HOLMES, J. This is an action to recover four hundred dollars, put into the defendant's hands by the plaintiff through the Western Union Telegraph Company, under the following circumstances. One Hoes, an inhabitant of Chicago, committed an offense here, and was arrested. It seems to have been for his interest to keep the matter private. He retained the defendant, who, on receipt of the above-mentioned money, recognized as surety for him and obtained his release from arrest. Afterward, a nolle prosequi was entered by reason of the insanity of Hoes. When arrested, Hoes telegraphed to the plaintiff, "Telegraph at once four hundred dollars to Hon. Edward J. Jenkins, my attorney. . . . Am in trouble. Don't fail." The plaintiff thereupon sent the money.

It hardly needs to be said that this transaction made no contract between the plaintiff and the defendant. The plaintiff's advance was to Hoes. When the money was received by Jenkins it was received by Hoes as between them and the plaintiff, and if the defendant kept it, that was by some arrangement between him and Hoes with which the plaintiff had nothing to do.

But there was evidence that Hoes was insane at the time, and the plaintiff claims a right to recover on that ground. This 363 must mean that he had a right to avoid his contract on the ground of the other party's insanity, and to demand his money wherever he could find it, unless the defendant, to whose hands it was traced, stood as a purchaser for value, or had changed his position, which fact the plaintiff had a right to deny, and did controvert in this case, except as to fifty or sixty dollars. We presume that the argument is, that if Hoes had become sane, and had affirmed his dealings with the defendant, the plaintiff still would have had

the right to prove that the defendant had no contract with Hoes, and was not a purchaser for value, and that, on the other hand, if Hoes had avoided his contract, his right to the money would be subject to the plaintiff's paramount right to the same fund, always supposing that the plaintiff had the right to avoid his contract also: *Buller v. Harrison*, 2 Cowp. 565, 568; *Cox v. Prentice*, 3 Maule & S. 344.

But the question is, whether the plaintiff had the right supposed. In *Holt v. Ward Clarendieux*, Strange, 937, it was held, on great consideration, that a person of full age contracting with an infant was bound absolutely, although the infant had a right to avoid her contract. The decision was on demurrer to a plea of the plaintiff's infancy, not alleging that the defendant was ignorant of the fact when he made the contract, but seems to have been made without regard to whether the defendant knew or not. This case is accepted without dispute as the law: *Thompson v. Hamilton*, 12 Pick. 425, 429; 23 Am. Dec. 619; *Warwick v. Bruce*, 2 Maule & S. 205; *Bruce v. Warwick*, 6 Taunt. 118; *Monaghan v. Agricultural etc. Ins. Co.*, 53 Mich. 238, 243; *Hunt v. Peake*, 5 Cow. 475; 15 Am. Dec. 475; *Cannon v. Alsbury*, 1 A. K. Marsh. 76; 10 Am. Dec. 709; *Johnson v. Rockwell*, 12 Ind. 76, 81; *Field v. Herrick*, 101 Ill. 110; 2 Kent's Commentaries, 78, 236; Leake on Contract, 3d ed., 476. The analogy between insane persons and infants is not perfect, but has prevailed in this matter. *Allen v. Berryhill*, 27 Iowa, 584; 1 Am. Rep. 309; *Harmon v. Harmon*, 51 Fed. Rep. 113; Bishop on Contracts, sec. 973; Clark on Contracts, 268. An insane person like Hoes, if he was insane, not a raving madman or an idiot, is capable of an act, even if his act be voidable. The promise of an insane man is not absolutely void: *Carrier v. Sears*, 4 Allen, 336, 337; 81 Am. Dec. 707; *Bullard v. Moor*, 158 Mass. 418, 424. So that it cannot be argued that the contract was formally defective and void because ³⁶⁴ only one party had done the necessary overt act. A voidable promise is a sufficient consideration: *Plympton v. Dunn*, 148 Mass. 523, 527. If a person unwittingly dealing with an insane man were given the right to avoid his contract when he found out the fact, it would be on grounds of policy and fairness, and of course it would be possible to read in a condition or personal exception to that effect. But there seems to be no more reason to do it in this case than when a man has contracted with an infant. The general rule is that a man takes the

risk of facts which he deems material, unless he expressly stipulates for them in his contract, or unless he is misled by a fraudulent misrepresentation: See *Ring v. Phoenix Assurance Co.*, 145 Mass. 426, 429. The right to avoid is for the personal protection of the insane, and those who deal with them have been held to have no corresponding rights in all the cases which we have seen. Upon these considerations, and in view of the decisions cited, we are of opinion that the plaintiff cannot repudiate his contract with Hoes. So long as that contract stands, at least, he cannot maintain an action against the defendant. Other defenses need not be considered. We express no opinion as to the law in case of a bilateral contract wholly unexecuted on both sides.

Exceptions overruled.

INSANE PERSONS—DISAFFIRMANCE OF CONTRACTS WITH.—Ignorance of the insanity of one with whom a contract is made is no defense to an action for the recovery of the subject matter of the contract: *Seaver v. Phelps*, 11 Pick. 304; 22 Am. Dec. 372; *Allen v. Berryhill*, 27 Iowa, 534; 1 Am. Rep. 309. A grantee in a conveyance voidable on account of the grantor's insanity, is estopped in an action of ejectment brought by the grantor's heirs to deny the grantor's title: *Wall v. Hill*, 1 B. Mon. 290; 36 Am. Dec. 578.

ABBOTT v. DOANE.

[163 MASSACHUSETTS, 483.]

CONTRACT—CONSIDERATION THAT THE PROMISEE WILL PERFORM HIS EXISTING OBLIGATION.—When one who is unwilling or hesitating to go on and perform a contract, which proves a hard one for him, is requested to do so by a third person who is interested in the performance, though having no legal way to compel it or to recover damages for a breach, and who accordingly makes an independent promise to pay a sum of money for such performance, such promise is not without consideration, and may be enforced. Therefore, if a person who has made an accommodation note which has been discounted at a bank, in consideration that he will pay such note, receives a note for a like amount from a director of the bank interested in having such payment made, the note so given by the director is not without consideration, and will support an action.

ACTION upon a promissory note. Defense, want of consideration. Verdict for the plaintiff.

W. B. French, for the defendant.

H. L. Parker, Jr., for the plaintiff.

⁴³⁴ ALLEN, J. The plaintiff had given his accommodation note to a corporation, which had had it discounted at a bank, and left it unpaid at its maturity. The defendant, being a stockholder, director, and creditor of the corporation, wishing to have the note paid at once for his own advantage, entered into an agreement with the plaintiff, whereby he was to give to the plaintiff his own note for the amount, and the plaintiff was to furnish money to enable the defendant to take up the note at the bank. This agreement was carried out, and the defendant now contends that his note to the plaintiff was without consideration, because the plaintiff was already bound in law to take up the note at the bank.

It is possible that, for one reason or another, both the bank and the plaintiff may have been willing to wait a while, but that the defendant's interests were imperiled by a delay, and indeed required that the note should be paid at once, and that the corporation, whose duty it was primarily to pay it, was without present means to do so. Since the defendant was sane, sui juris, was not imposed upon nor under duress, knew what he was about, and probably acted for his own advantage, it would certainly be unfortunate if the rules of law required us to hold his note invalid for want of a sufficient consideration, when he has had all the benefit that he expected to get from it.

In this commonwealth it was long ago decided that, even between the original parties to a building contract, if after having done a part of the work the builder refused to proceed, but afterwards, on being promised more pay by the owner, went on and finished the building, he might recover the whole sum so promised: *Munroe v. Perkins*, 9 Pick. 298; 20 Am. Dec. 475. See, also, *Holmes v. Doane*, 9 Cush. 135; *Peck v. Requa*, 13 Gray, 407; *Rogers v. Rogers*, ⁴³⁵ 139 Mass. 440; *Hastings v. Lovejoy*, 140 Mass. 261, 265; 54 Am. Rep. 462; *Thomas v. Barnes*, 156 Mass. 581. In other states there is a difference of judicial opinion, but the following cases sanction a similar doctrine: *Lattimore v. Harsen*, 14 Johns. 330; *Stewart v. Keteltas*, 36 N. Y. 388; *Lawrence v. Davey*, 28 Vt. 264; *Osborne v. O'Reilly*, 42 N. J. Eq. 467; *Goebel v. Linn*, 47 Mich. 489; 41 Am. Rep. 723; *Cooke v. Murphy*, 70 Ill. 96. In England and in others of the United States a different rule prevails.

But when one who is unwilling or hesitating to go on and perform a contract, which proves a hard one for him, is requested

to do so by a third person who is interested in such performance, though having no legal way of compelling it or of recovering damages for a breach, and who accordingly makes an independent promise to pay a sum of money for such performance, the reasons for holding him bound to such payment are stronger than where an additional sum is promised by the party to the original contract.

Take an illustration: A enters into a contract with B to do something. It may be to pay money, to render service, or to sell land or goods for a price. The contract may be not especially for the benefit of B, but rather for the benefit of others, as, e. g., to erect a monument, an archway, a memorial of some kind, or to paint a picture to be placed where it can be seen by the public. The consideration moving from B may be executed or executory; it may be money, or anything else in law deemed valuable; it may be of slight value as compared with what A has contracted to do. Now, A is legally bound only to B, and if he breaks his contract nobody but B can recover damages, and those damages may be slight. They may even be already liquidated at a small sum by the terms of the contract itself. Though A is legally bound, the notice to perform the contract may be slight. If, after A has refused to go on with his undertaking, or while he is hesitating whether to perform it or submit to such damages as B may be entitled to recover, other persons interested in having the contract performed intervene, and enter into a new agreement with A, by which A agrees to do that which he was already bound by his contract with B to do, and they agree jointly or severally to pay him a certain sum of money, and give their note or notes therefor, and A accordingly ⁴²⁶ does what he had before agreed to do, but what perhaps he might not otherwise have done, no good reason is perceived why they should not be held to fulfill their promise. They have got what they bargained for, and A has done what otherwise he might not have done, and what they could not have compelled him to do.

This has been so held in England, and the view is supported by English text-writers, though not always for precisely the same reasons: *Scotson v. Pegg*, 6 Hurl. & N. 295; *Shadwell v. Shadwell*, 30 L. J., N. S., C. P. 145; Pollock on Contracts, 6th ed., 175-177; Anson on Contracts, 4th ed., 87, 88; Leake on Contracts, 3d ed., 540. In this country the courts of several states have taken the opposite view, though in

some instances the cases referred to as so holding, when examined, do not necessarily lead to that result. These cases are collected in the defendant's brief, and in Williston's discussion of the subject in 8 Harv. Law Rev. 27.

Without dwelling further on the reasons for the doctrine, it seems to us better to hold, as a general rule, that if A has refused or hesitated to perform an agreement with B, and is requested to do so by C, who will derive a benefit from such performance, and who promises to pay him a certain sum therefor, and A thereupon undertakes to do it, the performance by A of his agreement in consequence of such request and promise by C is a good consideration to support C's promise.

Exceptions overruled.

CONTRACTS — PROMISE TO PERFORM EXISTING OBLIGATION AS CONSIDERATION.—The performance by a party of an act which he was legally bound to perform is not a sufficient consideration to support a promise to pay for the performance of such act: *Keith v. Miles*, 39 Miss. 442; 77 Am. Dec. 685, and note. But receiving the benefit of an act done by another is a sufficient consideration to sustain a subsequent express promise to pay for the performance of such act: *McMorris v. Herndon*, 2 Bail. 56; 21 Am. Dec. 515. See, also, the extended note to *Linneman v. Moross*, 39 Am. St. Rep. 532.

COMMONWEALTH v. HAYDEN.

[163 MASSACHUSETTS, 453.]

JURY TRIAL.—THE FACT THAT A PERSON IS EXEMPT FROM JURY DUTY DOES NOT DISQUALIFY HIM from service. While he may be excused at his own election, or excepted to by a party, if he serves, the action of a jury of which he is a member is not made void.

GRAND JURORS AS WITNESSES.—An indictment is not void because one of the grand jurors appeared as a witness before the grand jury of which he was a member. A grand jury may properly act upon the personal knowledge of one of its members communicated to his fellows under no other sanction than the grand juror's oath.

CRIMINAL PRACTICE.—A MOTION TO DISMISS AN INDICTMENT cannot be sustained upon any ground which does not appear upon the record of the cause.

EVIDENCE.—ON A PROSECUTION FOR BIGAMY A LETTER WRITTEN AND SIGNED BY THE DEFENDANT and describing himself as the son-in-law of the person to whom it is addressed is admissible in evidence against him as tending to prove his marriage to the daughter of the addressee.

EVIDENCE.—IN A PROSECUTION FOR BIGAMY THE TESTIMONY OF A WIFE is admissible to prove the defendant's marriage to her.

EVIDENCE.—IN A PROSECUTION FOR BIGAMY AN ATTESTED COPY OF THE RECORD OF THE MARRIAGE of the defendant from the records of the city registrar, certified by his assistant, is admissible.

EVIDENCE OF A WITNESS WHO PERFORMED A MARRIAGE CEREMONY that he was a clergyman and an ordained minister at the time of such celebration, and had been such for many years, is admissible in a prosecution for bigamy, because it is, at least, competent to prove that he was de facto discharging the duties of an ordained minister.

BIGAMY.—THE FACT THAT THE DEFENDANT PROSECUTED FOR BIGAMY OR POLYGAMY HAD A BONA FIDE AND REASONABLE BELIEF when contracting the second marriage that his first wife was dead does not entitle him to an acquittal.

ACTION charging the defendant with being lawfully married in 1891, at Boston, to Annie Dillon, and with having unlawfully, in September, 1894, married Emma M. Taylor. At the trial the defendant moved to dismiss the indictment because the foreman of the grand jury testified as a witness. The motion was overruled. The evidence of the first marriage consisted of the testimony of the first wife and of an attested copy of the record of the marriage, certified by an assistant registrar, and a letter written by the defendant to the mother of his first wife, signed by him as "Maurice A. Hayden, your son-in-law." The second marriage was proved by the witness who performed the marriage ceremony, and who testified that he was a clergyman of Boston and an ordained minister and pastor of a Congregational church, and had been such for many years, and also by testimony of the second wife, who testified to having read a letter from the mother of the first wife stating that the latter was dead. There was also the testimony of another witness to the effect that the defendant had told him that his first wife was dead, and that he had received a letter from her mother so stating. The defendant in substance requested the trial judge to rule that if the jury were satisfied that the defendant when contracting the second marriage honestly believed that his first wife was dead, he should be acquitted. The judge refused to so rule, and the defendant was convicted.

F. F. Sullivan, for the defendant.

M. J. Sughrue, first assistant district attorney, for the commonwealth.

455 **BARKER, J.** 1. Special police officers are not exempt from service as grand jurors: Pub. Stats., c. 170, sec. 2. Nor does the fact that a juror is exempt absolutely disqualify him from service. He may be excused at his own election, or may be excepted to by any party, but, if he serves, the action of the grand jury or traverse jury is not made void: *Munroe*

v. *Brigham*, 19 Pick. 368. See, also, *Wassum v. Feeney*, 121 Mass. 93; 23 Am. Rep. 258; *Moebis v. Wolffsohn*, 143 Mass. 130.

2. There is neither authority nor reason for the contention that the indictment was void because one of the grand jurors appeared as a witness before the grand jury, of which he was a member, at the same sitting of the court at which the indictment was presented. A grand jury may properly act upon the personal knowledge of any of its members communicated to his fellows under no other sanction than the grand juror's oath: *Commonwealth v. Woodward*, 157 Mass. 516; 34 Am. St. Rep. 302.

And there is no impropriety or wrong to the accused in having a grand juror, who has personal knowledge as to matters inquired of by his grand jury, sworn and testify as a witness. Indeed, there may under our practice be some incidental benefit to the accused in that course, as in that case his name will be found in the list of witnesses which is to be filed of record by the clerk: Pub. Stats., c. 213, sec. 9.

3. The motion to dismiss, by which alone the two questions above considered were raised, must also have been overruled for the technical reason that neither of the facts alleged in it as avoiding the indictment appeared upon the record of the cause, and so could not be availed of by a motion to dismiss: *Commonwealth v. Fredericks*, 119 Mass. 199, 204, and cases cited.

4. As the writing purporting to be a letter written and signed by the defendant was identified as his handwriting, it was competent evidence against him: *Stone v. Sanborn*, 104 Mass. 319, 324; 6 Am. Rep. 238; *Wiggin v. Boston etc. R. R. Co.*, 120 Mass. 201.

456 5. The testimony of Annie Dillon was competent to prove the defendant's marriage with her. The testimony of witnesses present at a marriage is competent to prove it: *Commonwealth v. Norcross*, 9 Mass. 492; *Commonwealth v. Littlejohn*, 15 Mass. 163; and this must be held to include the testimony of either of the contracting parties: *Commonwealth v. Dill*, 156 Mass. 226.

6. The attested copy of the record of the marriage of the defendant to Annie Dillon, from the records of the city registrar of Boston, certified to by the assistant registrar, was admissible in evidence. The records of town clerks relative to marriages are made by statute prima facie evidence in legal

proceedings of the facts recorded, and a certificate signed by the clerk is made admissible as evidence of the record: Pub. Stats. c. 32, sec. 11. See, also, Pub. Stats., c. 145, sec. 29. Towns and cities of more than ten thousand inhabitants may choose a person other than the clerk to be registrar, and in that case the provisions concerning clerks apply to the registrar. By the statutes of 1885, chapter 266, section 5, the city registrar of Boston has power to appoint his own subordinates. General authority to make ordinances concerning registrars and registration is given by the Public Statutes, chapter 32, section 18. By the Revised Ordinances of the city of Boston of 1885, chapter 20, section 2, there are allowed to the city registrar for the discharge of the duties of his department three clerks for copying and three for recording. By the statutes of 1892, chapter 314, section 2, the city registrar is required to appoint from his subordinates two assistant city registrars, and the same section provides that the certificates and attestations of either assistant city registrar shall have the same force and effect as those of the city registrar. The result is, that the certificate of the assistant city registrar admitted in evidence under the defendant's exception was plainly competent.

7. In proof of the defendant's unlawful marriage charged in the indictment, the government was allowed, against his objection and exception, to put in the testimony of a witness who performed the ceremony, that he was a clergyman in Boston, and an ordained minister and pastor of a Congregational church, and that he had been such pastor for many years. The defendant contends that the testimony of this witness was not competent ⁴⁵⁷ to prove his own ordination or his authority to bind parties in marriage. "A minister of the gospel ordained according to the usage of his denomination, who resides in the commonwealth and continues to perform the functions of his office," may solemnize marriages: Pub. Stats., c. 145, sec. 22. Whether the usage of the Congregational denomination requires a record to be made of the ordination of a minister does not appear in this cause, and is not a matter of which we have judicial knowledge. The evidence was at least competent to prove that the witness was *de facto* discharging the office of an ordained minister, and, under the peculiar statute regulating the proof of marriages in court, the testimony so excepted to was all "circumstantial or presumptive evidence," from which the fact of marriage might

be inferred, and so was competent under the statute: Pub. Stats., c. 145, sec. 31.

8. The different requests for rulings founded upon the contention that the defendant was not guilty of polygamy, if at the time he contracted his second marriage he had a bona fide and reasonable belief that his first wife was dead, were properly denied. We consider that question to have been settled in this jurisdiction by the decision in *Commonwealth v. Mash*, 7 Met. 472, rendered in the year 1844, in which, speaking of a statute substantially like that under which the present defendant was indicted, this court said that "it was not the intention of the law to make the legality of a second marriage, whilst the former husband or wife is in fact living, depend upon ignorance of such absent party's being alive, or even upon an honest belief of such person's death": See Rev. Stats., c. 130, secs. 2, 3; Gen. Stats., c. 165, secs. 4, 5; Pub. Stats., c. 207, secs. 4, 5. This statement has been since acted upon as a part of our system of law regulating marriages, and controlling persons contemplating marriage: See *Commonwealth v. Munson*, 127 Mass. 459, 470; 34 Am. Rep. 411.

If it ought to be changed the change should come from the legislature. We therefore decline to treat the defendant's contention as an open question in this commonwealth. If the reasons which, after much difference of opinion, have led to the final declaration in England, that an honest and reasonable belief in the death of the former wife or husband is a good defense to a prosecution for polygamy, should be dealt with here, it should ⁴⁵⁸ be by that department of the government which has the law-making power: See *Regina v. Tolson*, 23 Q. B. Div. 168; 16 Cox C. C. 629.

Exceptions overruled.

JURORS.—STATUTES CREATING EXEMPTIONS ARE NEVER CONSTRUED TO DISQUALIFY, but simply to excuse the persons so named: Extended note to *Commonwealth v. Green*, 12 Am. St. Rep. 902.

AN INDICTMENT CAN BE QUASHED ONLY FOR DEFECTS APPARENT UPON ITS FACE, and not for extraneous facts, although constituting a good defense: *Commonwealth v. Church*, 1 Pa. St. 105; 44 Am. Dec. 112, and note.

WITNESSES—JURORS AS.—That a juror may be a witness on a trial before himself and his fellows is well settled: Extended note to *Roy v. Horsley*, 25 Am. Rep. 540.

BIGAMY—COMPETENCY OF FIRST WIFE AS WITNESS.—On a trial for bigamy the first wife is incompetent as a witness against the defendant to establish the marriage: *Hiler v. People*, 156 Ill. 511, ante, p. 221, and note. See, also, the note to *State v. Johnson*, 93 Am. Dec. 255.

BIGAMY.—BELIEF THAT FIRST WIFE OR HUSBAND IS DEAD as a defense is discussed in the extended notes to *State v. Johnson*, 93 Am. Dec. 253, and *Farrell v. State*, 30 Am. Rep. 617.

CASEY v. MALDEN.

[168 MASSACHUSETTS, 507.]

NEGLIGENCE OF CHILD CONTRIBUTING TO HIS INJURY.—If a child between nine and ten years of age, of average intelligence, walks backward upon a public street a distance of twenty-five or thirty feet until he falls into a manhole, left open and unguarded, he is not in the exercise of due care, and having adopted a dangerous method of crossing the street, cannot recover for an injury which was the natural consequence of his recklessness.

TORT for personal injuries. The trial judge ruled that they were the natural consequence of the plaintiff's own negligence, and therefore that he could not recover.

A. J. Daly, for the plaintiff.

O. H. Carpenter, for the defendant.

508 LATHROP, J. The plaintiff, a boy between nine and ten years of age, and of average intelligence, was injured by falling into a manhole of a sewer, being constructed by the Metropolitan Sewerage Commissioners, acting under the statutes of 1889, chapter 439. The sewer was in a public street of the defendant city, and the manhole, which was about three feet in diameter, had been left open and unguarded from 8 o'clock in the morning until the time of the accident, which was between 3 and 4 o'clock in the afternoon. The plaintiff walked backward from the house where he lived, a distance of twenty-five or thirty feet, looking up at a boy and a girl on the roof of the house adjoining the one where he lived, until he fell into the manhole. The mother of the plaintiff testified at the trial, but only as to the length of time the manhole was open. There is nothing in her testimony to show any care exercised by her toward the plaintiff, or that she cautioned the plaintiff in regard to it. If the boy was too young to be trusted upon the street alone, the evidence does not show any exercise of care on the part of the mother, and this would prevent his recovery.

We assume, however, that a boy of average intelligence, between nine and ten years of age, may be trusted upon the street alone; and the question then is, whether the judge

rightly ruled that, upon the whole evidence, the plaintiff could not recover. We are of opinion that the ruling was right. The jury would not have been warranted in finding, upon the evidence, that the plaintiff was in the exercise of due care. The evidence was undisputed. The hole was in plain sight, if the plaintiff had looked. He voluntarily adopted a dangerous method of crossing a public street; and his injury was a natural consequence of his carelessness: *Messenger v. Dennie*, 137 Mass. 197; 50 Am. Rep. 295; and 141 Mass. 335; *Gay v. Essex Electric Street Ry.*, 159 Mass. 238; 38 Am. St. Rep. 415.

Verdict for the defendant to stand.

NEGLIGENCE—CONTRIBUTORY—CHILDREN, WHEN GUILTY OF.—A child more than seven years of age is bound to exercise such care as children of his age and capacity and intelligence are capable of exercising, and whether he did so or not is a question for the jury: *City of Pekin v. McMahon*, 154 Ill. 141; 45 Am. St. Rep. 114. Infants of tender years and wanting in discretion are not amenable to the disabling effects of contributory negligence: *Western Ry. v. Mutch*, 97 Ala. 194; 38 Am. St. Rep. 179, and note. See the note to *Oregon Ry. etc. Co. v. Egley*, 26 Am. St. Rep. 866, where the cases are collected.

The principal case is very similar to that of *Grindley v. McKechnie*, 163 Mass. 494. The declaration in that case charged that the defendant McKechnie was the owner of a lot on Dorchester avenue, near the junction of that avenue with Boston street, and that the defendant Jobbling was constructing a building on such lot, for his codefendant, very close to the sidewalk of Dorchester avenue; that the defendants, in the course of such construction, caused a hole or trench to be dug in the earth at the rear of the building, several feet long, wide, and deep, which became filled with water, on the surface of which boards and other materials floated, concealing any apparent danger, which hole or trench the defendants allowed to remain in the dangerous condition for several days; that the hole was within twenty-five feet of the avenue, a much frequented street in the city, and there was nothing to obstruct access from the hole to the street, nor any warning of danger given; that the plaintiff's intestate, a child five years of age, who, in the exercise of due care, and lawfully on the premises, fell into the hole or trench, owing to the negligent conduct of the defendants, and, being unable to get out, finally died. The defendants, having interposed a demurrer to the declaration on the ground that it did not state any cause of action, nor any duty on the part of the defendants toward the plaintiff, nor any breach thereof, the superior court sustained the demurrer; and the plaintiff having appealed to the supreme judicial court, the judgment of the trial court was there affirmed, the court saying: "The judgment of the superior court was in accordance with our decisions: *McEachern v. Boston etc. R. R.*, 150 Mass. 515; *Daniels v. New York etc. R. R.*, 154 Mass. 349; 26 Am. St. Rep. 253; *Sullivan v. Boston etc. R. R.*, 156 Mass. 378; *Gay v. Essex etc. Ry.*, 159 Mass. 238; 38 Am. St. Rep. 415."

BAKER v. SEAVEY.

[168 MASSACHUSETTS, 522.]

MORTGAGE OF CHATTELS—EQUITABLE ASSIGNMENT—TROVER.—One who purchases notes secured by a mortgage of chattels, and which are indorsed and delivered to him under an oral agreement to make a written assignment of the mortgage, cannot maintain an action in his own name for the conversion of the property.

MORTGAGE OF CHATTELS—TROVER.—A SECOND MORTGAGEE of chattels, who is neither in actual possession nor entitled to such possession, cannot maintain an action for their conversion.

ESTOPPEL TO ASSERT MORTGAGE AGAINST CREDITORS.—If a person applied to concerning the standing of a company of which he is an officer asserts that its property is free and clear of encumbrances when he knows it to be subject to mortgages then in his possession, and such assertions are made with intent to have credit given to the company, and such credit is afterward given in reliance upon such representations, he is estopped from asserting such mortgages as against persons extending credit on the faith of his misrepresentations and officers who have seized the property under a writ of attachment issued on behalf of such creditors.

ESTOPPEL ARISING FROM MISREPRESENTATIONS.—He who by his words or conduct willfully endeavors to cause another to believe in a certain state of things which the first knows to be false, is, if the second believes in such state of things, and acts upon his belief, estopped from afterward averring that such a state of things did not exist.

EVIDENCE—CONTRADICTING OFFICER'S RETURN.—If an officer is sued for the conversion of property, and his return does not enumerate all the articles attached, he may prove that he did not attach or convert the articles claimed by the plaintiff, and even if his return does contain such enumeration, it is not conclusive in an action against him by a third person, and the officer may, as against the latter, prove that he did not take all the articles stated in the return.

EVIDENCE.—THE PRICE OBTAINED AT AUCTION is competent evidence on the question of the value of the property.

TORT against a deputy sheriff for attaching and converting certain fixtures and furniture. This property had been used as a restaurant and belonged to the Boston Café Company, and the attachment under which the officer justified had issued against that company and in favor of the Smith and Anthony Stove Company. The plaintiff's cause of action was based upon two mortgages, the first of which, dated January 13, 1889, had been made payable to E. A. Brown, from whom plaintiff purchased it on October 16th of the same year. The mortgagee delivered the mortgage to the plaintiff, together with the notes secured thereby, and agreed orally to make an assignment in writing, but this assignment was not executed until after the commencement of the present

action. The second mortgage was made payable to plaintiff, and dated December 20, 1889. Both of these mortgages had been executed by one Wyman, who was then the owner of the property covered thereby, and which he afterward transferred, subject to the mortgages, to the Boston Café Company. Plaintiff was an officer of this company, and, after he had acquired his interest under the mortgages, was applied to by Morandi, an agent of the Smith and Anthony Stove Company, for information respecting the standing of the Boston Café Company, and, in response to inquiries, stated that its property, including that in controversy in this action, was entirely unencumbered. Relying upon the information thus received, the Smith and Anthony Stove Company sold goods on credit to the Boston Café Company, and, in an action to recover for the indebtedness thus created, attached the property here in controversy. There was oral evidence offered on the part of the defendant to show that plaintiff had no title to some of the articles claimed by him, and also that other articles thus claimed were not attached by the defendant, and, further, that the goods were sold at auction, and the prices obtained at the sale, all of which evidence, on objection of the plaintiff, was excluded. Among the requests for instructions made by the defendant and refused by the court were the following: "2. If it shall appear upon all the evidence that one E. A. Brown had agreed, before the time of the beginning of this action, to assign the first mortgage, mentioned in the plaintiff's notice to the defendant, to the plaintiff, but omitted so to do, and an assignment in writing of the said mortgage was not made until after the bringing of this action, then the plaintiff cannot maintain this action in his own name against the defendant for the value of any goods which might be covered by the said first mortgage. 3. If it shall appear that there was no legal assignment of the first mortgage to the plaintiff before the commencement of this action, and it shall appear that he was a bona fide holder of the second mortgage, then, as owner and holder of the said second mortgage, he cannot maintain this action of trover against the defendant." "6. A second mortgagee, not in possession, cannot maintain the action of trover for the conversion of the goods covered by his mortgage." "9. If the jury shall find that Morandi, acting as agent of the Smith and Anthony Stove Company, in good faith went to the plaintiff while he was an officer of the Boston Café Company,

and made inquiries concerning the standing of the company, and inquiries as to whether the property contained in said store at 737 Washington street belonged to the said Boston Café Company and was encumbered, and, in reply to the said question or questions of the said Morandi, the plaintiff in this action informed the said Morandi that the said property contained in said store was free and clear, and not encumbered by any mortgages, and that at the time the said plaintiff in this action knew that the said property was encumbered by both the mortgages under which he now claims, and if he shall have made the statements with the intent that the said Morandi, as agent of the said Smith and Anthony Stove Company, should give credit to the said Boston Café Company, relying upon the statement of the plaintiff, and the said Smith and Anthony Stove Company, by Morandi, its agent, did place certain goods in and upon the premises at 737 Washington street, and at other places owned by the said Café company, then the plaintiff in this action would be estopped from setting up, as against the Smith and Anthony Stove Company, or its agents, the mortgages which were in existence at the time of the statement made by him that the property was free and clear, and the jury must treat said mortgages as though they were not in existence, but extinguished as far as this case is concerned, and must render a verdict for the defendant." These instructions were refused by the trial judge, who told the jury that the plaintiff was under no obligation to state whether the property was encumbered or not, and that any misrepresentation made by him in that respect could not affect his legal rights. Verdict for the plaintiff.

C. W. Bartlett and E. R. Anderson, for the defendant.

P. H. Cooney, for the plaintiff.

525 ALLEN, J. 1. The plaintiff, by reason of the equitable assignment of the first mortgage to him, acquired a right which to some extent a court of law will recognize and protect; but such an equitable assignment will not entitle him to maintain an action at law in his own name for the conversion of the property, and the jury should have been so instructed, in conformity to the defendant's second request: *Crain v. Paine*, 4 Cush. 483; 50 Am. Dec. 807; *Norton v. Piscataqua Ins. Co.*, 111 Mass. 532; *Rogers v. Union Stone*

Co., 134 Mass. 31; *Moore v. Spiegel*, 143 Mass. 413; *Coulter v. Haynes*, 146 Mass. 458. Such action can only be maintained in the name of the mortgagee.

2. The plaintiff in his capacity of second mortgagee cannot maintain an action for the conversion of the property, because he was not in actual possession, and as second mortgagee was not ⁵²⁶ entitled to the immediate possession: *Rugg v. Barnes*, 2 Cush. 591; *Ring v. Neale*, 114 Mass. 111; 19 Am. Rep. 316; *Clapp v. Campbell*, 124 Mass. 50. The defendant's third and sixth requests presented the technical question as to the form of action which the plaintiff, as second mortgagee, could maintain. In substance these requested instructions were right, and a second mortgagee's ground of action should be set forth in a different form: *Forbes v. Parker*, 16 Pick. 462.

3. The ninth request for instructions related to the question of estoppel, and this also should have been given. It is not denied that there was evidence tending to prove the facts assumed in the request. But the plaintiff contends, as a reason for avoiding the supposed estoppel, that the creditors of the café company did not acquire or contemplate acquiring any title or interest in the property in consequence of his supposed representations; that they entered into no binding agreement by which they undertook to sell goods to that company on credit; and that if they should so sell goods on credit they would thereby acquire no title in the property of the company. In short, the plaintiff's argument is that the connection between the supposed representations and the loss to the creditors is not close enough. In support of this view, he cites *Bradley v. Fuller*, 118 Mass. 239, which was an action to recover damages for misrepresentations by reason of which the plaintiff forbore to make an attachment of property; and in which it was held that the plaintiff lost nothing which he had, and that he had sustained no legal damage. *Dudley v. Briggs*, 141 Mass. 582, 55 Am. Rep. 494, is similar in principle. But the rule as held in those cases is not applicable to the case at bar. Here, according to the assumptions in the request for instructions, the misrepresentations were made with intent to induce the creditors to part with their property, and the creditors, relying thereon, did in fact part with their property, by selling it to the café company on credit. Under such circumstances, the objection that the connection was not close enough between the misrepresentations and the loss of prop-

erty would not avail, even in defense to an indictment for obtaining goods by false pretenses: *Commonwealth v. Davidson*, 1 Cush. 33; 2 Bishop's Criminal Law, 8th ed., sec. 437; Wharton's Criminal Law, sec. 1135. But we have not to determine whether an indictment, or even ⁵²⁷ an action, would lie against the plaintiff. The question before us is, whether, upon the assumed facts, the plaintiff is now estopped to set up his mortgages against the attaching creditors and the defendant, who as an officer acted for them in making the attachment. And we cannot doubt that he is. In *Carr v. London etc. Ry. Co.*, L. R. 10 Com. P. 307, 316, the rule as to estoppel arising from intentional acts or words is thus carefully expressed: "If a man, by his words or conduct, willfully endeavors to cause another to believe in a certain state of things which the first knows to be false, and if the second believes in such state of things, and acts upon his belief, he who knowingly made the false statement is estopped from averring afterward that such a state of things did not in fact exist." This is in substance the rule which has often been recognized and acted on in this commonwealth: *Plumer v. Lord*, 9 Allen, 455; 85 Am. Dec. 773; *Langdon v. Doud*, 10 Allen, 433; *Turner v. Coffin*, 12 Allen, 401; *Tobey v. Chipman*, 13 Allen, 123; *Fall River Nat. Bank v. Buffinton*, 97 Mass. 498; *Hinchley v. Greany*, 118 Mass. 595; *Moore v. Spiegel*, 143 Mass. 413; *Short v. Currier*, 150 Mass. 372. The assumed facts bring the present case within this rule, and the defendant was entitled to have the jury instructed in accordance with his ninth request.

4. The questions of evidence presented by the bill of exceptions, to a considerable extent, would not probably arise again in the same form. Without dealing with them in detail, it will probably be sufficient if we express our opinion upon a few general propositions involved therein.

The plaintiff must recover, if at all, upon the strength of his own title, and it was therefore competent for the defendant to introduce evidence to show that the plaintiff had no title to certain of the articles: *Rogers v. Cromack*, 123 Mass. 582; *Roberts v. Wentworth*, 5 Cush. 192; *Johnson v. Neale*, 6 Allen, 227; *Stanley v. Neale*, 98 Mass. 343.

The defendant might show that certain articles claimed by the plaintiff were not attached. His return contained no enumeration of the articles attached; but, even if it had done so, it would not be conclusive against the defendant in an

action brought by the present plaintiff to recover damages for the alleged taking: *Taylor on Evidence*, sec. 854; *Stimson v. Farnham*, L. R. 7 Q. B. 175; ⁵²⁸ *Baker v. M'Duffie*, 23 Wend. 289; *Brown v. Davis*, 9 N. H. 76, 82; *Boynston v. Willard*, 10 Pick. 166, 169, 170, *dictum*.

The price obtained at auction was competent evidence on the question of value: *Kent v. Whitney*, 9 Allen, 62; 85 Am. Dec. 739; *Brigham v. Evans*, 113 Mass. 538; *Croak v. Owens*, 121 Mass. 28; *Clement v. British American Assur. Co.*, 141 Mass. 298, 301.

Exceptions sustained. —

TROVER BY MORTGAGEE OF CHATTELS FOR CONVERSION.—A chattel mortgagee does not become the absolute owner of the mortgaged chattels upon condition broken, nor does he then become entitled to the immediate possession of the property unconditionally. Therefore he cannot maintain trover for its conversion without alleging his special ownership and interest therein at the time of the conversion: *Kennett v. Peters*, 54 Kan. 119; 45 Am. St. Rep. 274, and note. An equitable assignment of a note and mortgage of chattels may be made by mere delivery thereof as security for a debt without a written assignment, but the assignee cannot maintain trover for the goods in his own name without a written assignment, but may sue in the assignor's name: *Craie v. Paine*, 4 Cush. 483; 50 Am. Dec. 807, and note.

CHATTEL MORTGAGE—TROVER BY SECOND MORTGAGEE.—A second mortgagee of personal property who is not in actual possession cannot maintain an action in the nature of trover for its conversion: *Ring v. Neale*, 114 Mass. 111; 19 Am. Rep. 316.

ESTOPPEL IN PAIS—FALSE REPRESENTATIONS.—Estoppel in pais arises whenever an act is done or a statement made by a party the truth of which it would be a fraud to permit him to impair: *Commonwealth v. Mott*, 10 Pa. St. 527; 51 Am. Dec. 499; *Welland Canal Co. v. Hathaway*, 8 Wend. 480; 24 Am. Dec. 51; *Simpson v. Pearson*, 31 Ind. 1; 99 Am. Dec. 577; *Brown v. Wheeler*, 17 Conn. 345; 44 Am. Dec. 550; *Ray v. McMurtry*, 20 Ind. 307; 83 Am. Dec. 322, and note; *Davis v. Davis*, 26 Cal. 23; 85 Am. Dec. 157, and note. False representations, if relied upon by a party ignorant of the truth, may create an estoppel in his favor though he had constructive notice of their falsity by matter of record: *Graham v. Thompson*, 55 Ark. 296; 29 Am. St. Rep. 40, and note.

THE PRICE FOR WHICH GOODS SOLD AT AUCTION IS ADMISSIBLE AS EVIDENCE of their value: *Kent v. Whitney*, 9 Allen, 62; 85 Am. Dec. 739, and note.

BELL v. AMERICAN PROTECTIVE LEAGUE

[163 MASSACHUSETTS, 553.]

LANDLORD AND TENANT—ASSIGNEE OF LEASE BY VIRTUE OF INSOLVENCY PROCEEDINGS.—While there is no privity of contract between a lessor and an assignee of the term, there is a privity of estate rendering the assignee liable upon the covenants of the lease so long as he holds the term. This rule applies to assignees in bankruptcy and insolvency, providing they take possession.

LANDLORD AND TENANT.—AN ASSIGNEE OF A LEASE OR AN ASSIGNEE IN BANKRUPTCY of the lessee may relieve himself from further responsibility by assigning the term to another, however irresponsible the latter may be.

A RECEIVER is merely a ministerial officer of the court. The title to the property does not change, and his custody is that of the court.

LANDLORD AND TENANT.—A RECEIVER TAKING POSSESSION OF A LEASEHOLD ESTATE DOES NOT BECOME THE ASSIGNEE of the term, nor liable on the covenants of the lease. He is answerable only for reasonable rent during the time he retains possession.

PETITION praying that the receiver of a lessee be ordered to fulfill the covenants of a lease. This lease, executed July 15, 1890, was for the term of fourteen years and nine and a half months. The lessee became insolvent in 1892, and in November of the same year a receiver was appointed and qualified. He, relying on the verbal promise of the petitioner to consent to a sale and assignment of the lease, took possession of the premises for the purpose of endeavoring to effect such sale, and succeeded in entering into a contract therefor, the execution of which appeared to have been prevented by the petitioner's refusal to consent to any assignment. The receiver continued in possession until October, 1893, after which, with the sanction of the court, he abandoned the demised premises, and never thereafter exercised any further act of ownership over them. The petitioner refused to accept such abandonment, and by the present proceeding sought to compel the receiver to retain the premises and to perform the covenants of the lease. In June, 1894, the receiver, with the sanction of the court, assigned all his interest and that of the original lessee in the lease to an irresponsible person. The judge of the lower court decided that until this later assignment the receiver continued liable upon the lease, and entered a decree against him for five thousand four hundred dollars, with interest.

G. Putnam, for the receiver.

R. M. Morse and G. P. Wardner, for the petitioner.

⁵⁶⁰ LATHROP, J. It does not clearly appear whether the superior court took jurisdiction of the bill in equity of Bell and others against the American Protective League by virtue of the general equity jurisdiction conferred upon it by the statutes of 1883, chapter 223, or by virtue of the statutes of 1892, chapter 435, which gives to the supreme judicial court and to the superior court "exclusive and concurrent jurisdiction, in cases of insolvency, of the settlement of the affairs of corporations which are authorized to transact insurance upon the assessment plan, or of any fraternal beneficiary corporations which are so authorized," and which provides that, "to that end," the court "may appoint agents or receivers to take possession of the property and effects of the corporations, subject to such rules and orders as may, from time to time, be prescribed by said courts, or any justice thereof." The language of this statute follows the form of the decree long ago prescribed by this court appointing a receiver of an insolvent corporation, which form was adopted by the superior court ⁵⁶¹ when equity jurisdiction was conferred upon it. It makes no difference, therefore, whether the receiver was appointed under the general equity jurisdiction of the superior court or under the statute above referred to.

The question presented in this case is as to the correctness of the ruling of the superior court that the receiver, by reason of the facts reported, became liable, by privity of estate, upon the covenants of the lease, and continued so liable until the receiver assigned the lease to one Clancy.

It is a familiar doctrine of the common law, that while there is no privity of contract between the lessor and the assignee of a term there is a privity of estate, which renders the assignee liable upon the covenants of the lease so long as he holds the term. This applies not only to private individuals, but to assignees in bankruptcy and insolvency, as the title to the leasehold estate vests in them, provided they take possession.

But an assignee of a term or an assignee in bankruptcy may, by assigning the term, free himself from all further responsibility. And this assignment may be made to any one, however irresponsible he may be, provided the assignor does not retain any interest in the thing assigned: See 2 Platt on Leases, 400-452. The rights and duties of an assignee of an insolvent debtor are now regulated in this commonwealth by the statute of 1879, chapter 245, re-enacted

in the Public Statutes, chapter 157, section 26: See *Abbott & Stearns*, 139 Mass. 168.

The decree in the court below, that the petitioner was entitled to recover, apparently proceeded upon the ground that the same rule applied to a receiver as to an assignee in bankruptcy; and this seems to have been assumed to be the law in *Commonwealth v. Franklin Ins. Co.*, 115 Mass. 278, 281. It is to be observed, however, that that case was submitted on briefs, as appears by the reporter's docket, and the question now before us was not taken by the counsel for the receivers, whose brief we have examined, nor was it discussed by the court. There were two petitions in the case, each relating to a separate parcel of land. One petition was dismissed, and the other was granted. In relation to the latter, the facts were that at the time the receivers were appointed the insurance company was lessee of a room in a building which it had prior to that time sublet. By the terms of ~~see~~ the lease to the insurance company, when the receivers were appointed, two quarterly payments of rent would become due in the future. When the first became due, the lessors demanded the rent and threatened to eject the sublessee if the rent was not paid. Certain negotiations were had between the lessors and the receivers, which the court found amounted to an agreement by the receivers to pay to the lessors the rent in full for the first quarterly payment, and a dividend on the last payment. The first payment was made, and the controversy was as to the last payment under the lease, the lessors contending that they were entitled to the entire rent, and the receivers that, as they had not taken possession of the land, they were not liable at all. The decision of the court was that the agreement should be carried out; and the lessors "are therefore entitled to such dividend on the amount of rent and taxes so due as is paid to other creditors." It will be seen, therefore, that the case did not turn upon the effect of a receiver taking possession of a leasehold estate, but upon the effect of a contract, made by receivers with the lessors of a leasehold estate, in relation to the rent.

It is difficult to see upon what principle a receiver, in the absence of a statute vesting the title of the insolvent in him, can, in any legal sense, be said to be the assignee of a term. In *Ellis v. Boston etc. R. R. Co.*, 107 Mass. 1, 28, it was said by Mr. Justice Wells, speaking of a decree of this court appointing receivers of a railroad company: "It had no effect

to change the title, or create any lien upon the property. Its purpose, like that of an injunction *pendente lite*, was merely to preserve the property until the rights of all parties could be adjudged. The receivers are officers of the court for this purpose, and act under its direction and control."

A receiver is merely a ministerial officer of the court, or, as he is sometimes called, the hand of the court. The title to the property does not change; and, if he is required to take property into his custody, such custody is that of the court: *Union Bank v. Kansas City Bank*, 136 U. S. 223, 236; *Thompson v. Phenix Ins. Co.*, 136 U. S. 287, 297.

The question now before the court was carefully considered in *Gaither v. Stockbridge*, 67 Md. 222, and it was held, as a necessary deduction from the principles which we have stated, ⁵⁶³ that a receiver, by taking possession of a leasehold estate, did not become the assignee of the term. This case was cited with approval by Chief Justice Fuller in the case of *Quincy etc. R. R. Co. v. Humphreys*, 145 U. S. 82, 97, 98. It is true that the authority of the case as a precedent is somewhat weakened by the fact that the learned chief justice proceeded to show that the receivers in that case were not responsible on the covenants of the lease, even if they were regarded as assignees, and by the fact that in the subsequent case of *United States Trust Co. v. Wabash Western Ry. Co.*, 150 U. S. 287, Mr. Justice Brown, in delivering the opinion of the court, overlooks or disregards the language of Chief Justice Fuller, and considers a receiver to stand in the same position as an assignee. It was held, however, that the mere act of taking possession of leasehold property did not render the receiver liable on the covenants of the lease, but that he was entitled to a reasonable time after taking possession to determine whether to affirm the lease and retain the premises, or to give them up.

There are many cases in New York in which it is asserted that there is no difference between an assignee and a receiver who takes possession of leasehold premises. We understand, however, that in New York a receiver of an insolvent corporation has vested in him by statute the title of the insolvent: See *Attorney General v. Life etc. Ins. Co.*, 4 Paige. 224; *Booth v. Clark*, 17 How. 322, 331.

We regard the question presented in the case at bar as an open one in this commonwealth, and, on principle, it seems to us that if a receiver of an insolvent corporation takes posses-

sion of its leasehold estate, he is liable only for a reasonable rent during the time that he retains possession; that he does not become an assignee of the term, and is not liable on the covenants of the lease.

As the receiver paid rent to the satisfaction of the lessor, while in possession, we are of opinion that he is not liable for any further rent. It follows, therefore, that the decree of the superior court was erroneous, and must be reversed.

Decree accordingly.

LANDLORD AND TENANT—ASSIGNMENT OF LEASE—LIABILITY OF ASSIGNEE.—If the lessee assigns his whole estate without reserving to himself any reversion therein, a privity of estate is at once created between the assignee and the original lessor, and the latter has a right of action directly against the assignee on the covenants running with the land: *Sexton v. Chicago Storage Co.*, 129 Ill. 318; 16 Am. St. Rep. 274. The assignee of a leasehold estate is liable for the rent according to the terms of the lease, but the fact of his liability after the assignment does not discharge the original tenant from his covenant to pay rent: *Grommes v. St. Paul Trust Co.*, 147 Ill. 634; 37 Am. St. Rep. 248, and note. This subject is fully discussed in the extended notes to *Washington etc. Gas Co. v. Johnson*, 10 Am. St. Rep. 559, and *Coburn v. Goodall*, 1 Am. St. Rep. 83.

LANDLORD AND TENANT—ASSIGNMENT OF LEASE BY ASSIGNEE.—An assignee of a lease may discharge himself from all liability for subsequent breaches of the covenants thereof, by assigning to an insolvent, a prisoner, or a married woman, even though it be made for the express purpose of avoiding his liability, and a premium be given as an inducement to accept the transfer: *Johnson v. Sherman*, 15 Cal. 287; 76 Am. Dec. 481, and note; extended note to *Washington etc. Gas Co. v. Johnson*, 10 Am. St. Rep. 559.

RECEIVERS—TITLE OF.—A receiver is a quasi trustee holding property for the benefit of whoever may eventually establish title thereto: *King v. Goodwin*, 130 Ill. 102; 17 Am. St. Rep. 277. See the notes to *Chautauque County Bank v. White*, 57 Am. Dec. 451, and *Porter v. Williams*, 59 Am. Dec. 525.

JONES v. PARKER.

[163 MASSACHUSETTS, 564.]

SPECIFIC PERFORMANCE WILL BE ENFORCED OF A COVENANT IN A LEASE that during the term the lessor will reasonably light and heat the demised premises. The fact that the court may be called upon to form a scheme for heating and lighting, and to provide the proper apparatus does not justify it in declining jurisdiction.

SUIT to enforce specific performance of covenants in a lease. The allegations were to the effect that in September, 1893, the defendant, Parker leased to the plaintiff certain premises in the city of Boston, covenanting to deliver possession thereof

to the plaintiff upon the completion of the building, then in progress of construction, and thereafter, during the term of the lease, reasonably to heat and light the demised premises, and that the occupancy of such premises for the purposes contemplated in the lease was not possible until the completion of proper apparatus for heating and lighting the same; that the building had been completed, and that Parker had conveyed his interest therein to the defendant Emma M. Blackall, and that the defendants refused to construct apparatus sufficient to reasonably light and heat the premises or to deliver them to the plaintiff, and intended to rent them to some other person. Hence the complainants prayed that the defendants be restrained from executing any other lease, and ordered to complete the premises, and deliver them to the plaintiff, with apparatus sufficient to reasonably light and heat them. The lease from Parker to the complainant contained a covenant, as lessor, "to deliver possession of the same to the lessee upon completion of said building, and thereafter, during the term of this lease, reasonably to light and heat the demised premises." The second bill sought similar relief in respect to other premises under a lease containing a covenant in substantially the same form as that stated above. The defendants demurred to the bills for want of equity, and because plaintiff had a plain, adequate, and complete remedy at law, and upon other grounds. The demurrers having been sustained, the plaintiff appealed.

J. Willard, for the plaintiff.

G. L. Wentworth, for the defendants.

566 HOLMES, J. The case of *Jones v. Parker* is a bill in equity brought by a lessee upon a lease purporting to begin on September 1, 1893, and to demise part of a basement in a building not yet erected. The lessor "covenants to deliver possession of the same to the lessee upon completion of said building, and thereafter, during the term of this lease, reasonably to heat and light the demised premises." It is alleged that the building has been completed, but that the defendants refuse to complete the premises with apparatus sufficient to heat and light the same, and to deliver the same to the plaintiff. It also is alleged that the occupancy of the premises for the purpose contemplated in the lease was impossible without the construction in the premises of proper apparatus for heating and lighting them before delivery to the plaintiff.

The prayer is for specific performance of the covenant quoted, and for damages. The defendant demurs.

It does not need argument to show that the covenant is valid. Whether it should be enforced specifically admits of more doubt, the questions being whether it is certain enough for that purpose: Fry on Specific Performance, 3d ed., secs. 380-386; and whether a decree for specific performance would not call on the court to do more than it is in the habit of undertaking: *Lucas v. Commerford*, 3 Bro. C. C. 166, 167; *Ross v. Union Pac. Ry. Co.*, Wool. 26, 43. We are of opinion that specific performance should be decreed. With regard to the want of certainty of the covenant, if the plaintiff were left to an action at law, a jury would have to determine whether what was done amounted to a reasonable heating and ⁵⁶⁷ lighting. A judge sitting without a jury would find no difficulty in deciding the same question. We do not doubt that an expert would find it as easy to frame a scheme for doing the work. The other question is practical rather than a matter of precedent. It fairly is to be supposed, in the present case, that the difference between the plaintiff and the defendants is only with regard to the necessity of some more or less elaborate apparatus for light and heat, a difference which lies within a narrow compass, and which can be adjusted by the court. There is no universal rule that courts of equity never will enforce a contract which requires some building to be done. They have enforced such contracts from the earliest days to the present time: Fry on Specific Performance, 3d ed., secs. 88, 98, 102, 103; Story's Equity Jurisprudence, secs. 725-728; Year Book, 8 Edw. IV., pl. 11; *Twynford v. Wareup*, Finch, 310.

A further objection is taken, that the instrument is a lease, and therefore there is a remedy for possession of the premises at law, and that the covenant to heat and light is not to be performed until after possession is taken. It would be a sufficient answer that performance of the covenant to heat and light was to begin at the moment of performance of the covenant to deliver possession, and that the defendant is alleged to have repudiated both of these obligations. But we may go further. According to the allegations of the bill, occupation of the premises for the contemplated purposes is impossible without the completion of them by the construction therein of proper apparatus for heating and lighting. The covenant itself affords an argument that artificial light

and heat were necessary constituents of the premises, as natural light was in *Brande v. Grace*, 154 Mass. 210; or a cistern in *Cleves v. Willoughby*, 7 Hill, 83, 90, 91. It is "so interwoven with the original contract as to become an essential part of it": *Bally v. Wells*, 3 Wils. 26, 30. If so, the plaintiff would not be bound to accept possession if offered without artificial light and heat: *Cleves v. Willoughby*, 7 Hill, 83; and although it has been said with truth, in a different class of cases, that the mode in which one party to a bargain shall enable himself to do what he has agreed to do is no part of the contract (*Pratt v. American Bell Teleph. Co.*, 141 Mass. 225, 229, 55 Am. Rep. 465), the present covenant fairly may be construed to mean that, at the moment ~~see~~ when delivery of possession is due there shall be the necessary machinery or apparatus without which it would be impossible "thereafter . . . reasonably to heat and light the demised premises": See *Bullard v. Shirley*, 153 Mass. 559, 560.

The last objection taken is based on an allegation that the lessor Parker has conveyed the reversion to Blackall. It is not alleged that Blackall had notice of Parker's covenant. But as the lease is for less than seven years, it is valid without recording or notice (Pub. Stats., c. 120, sec. 4), and the assignment does not entitle Blackall to prevent the performance of the covenant. We need not consider whether the covenant runs with the reversion by virtue of the statute of 32 Henry VIII., chapter 34, section 2, a question not to be confused with the different one as to the covenants attaching a burden or a right to land at common law irrespective of privity or the mention of assigns, after the analogy of commons or easements, or the yet different one as to the transfer of the benefit of warranties or covenants for title to assigns, when mentioned, being privies in estate with the original covenantees: *Norcross v. James*, 140 Mass. 188; *Middlefield v. Church Mills Knitting Co.*, 160 Mass. 267. This covenant is pretty near the line as it has been drawn between covenants that will and those that will not pass under the statute in respect of their nature; assigns are not mentioned, and the plaintiff has not entered; but perhaps none of these objections would be fatal: *Spencer's Case*, 5 Co. Rep. 16, and note in 1 Smith's Leading Cases in Equity, 145, 150-174; Moore, 159, pl. 300; *Jourdain v. Wilson*, 4 Barn. & Ald. 266, 268; *Doughty v. Bowman*, 11 Q. B. 444; *Minshull v. Oakes*, 2 Hurl. & N. 793, 808; Rawle on Covenants, 5th ed., secs. 313, 318;

Williams v. Bosanquet, 1 Brod. & B. 238; *Simonds v. Turner*, 120 Mass. 328. However this may be, the plaintiff is entitled to his lease and to his heat and light, notwithstanding the assignment, and whether the covenant passes or not he can hold the defendant Parker on his express contract. All the cases which have come under our eye are cases of covenants by lessees, but the reasoning is equally good for covenants by lessors: *Wall v. Hinds*, 4 Gray, 256, 266; 64 Am. Dec. 64; *Mason v. Smith*, 181 Mass. 510, 511; *Barnard v. Godscall*, Cro. Jac. 809; *Brett v. Cumberland*, Cro. Jac. 521; *Bachelour v. Gage*, Cro. Car. 188; *Pitcher v. Tovey*, 4 Mod. 71, 76; *Auriol v. Mills*, 4 Term Rep. 94, 98, 99.

⁵⁶⁹ In the case of *Jones v. Grover* the covenant is substantially similar to that in the first case. The instrument, although in form a lease for ten years, is not to begin to run until the completion and delivery of the premises. It has been recorded, and there has been no assignment. The plaintiff's title to relief is free from some of the difficulties which have been discussed.

Demurrers overruled.

SPECIFIC PERFORMANCE—CERTAINTY OF CONTRACT NECESSARY TO.—A contract, to be specifically enforced, must be certain in every part: *Rankin v. Maxwell*, 2 A. K. Marsh. 488; 12 Am. Dec. 431. Specific performance will not be decreed unless the terms of the contract are clear and definitely ascertained: *Robbins v. McKnight*, 5 N. J. Eq. 642; 45 Am. Dec. 406, and note; *Haselton v. Putnam*, 3 Pinn. 107; 3 Chand. 117; 54 Am. Dec. 159. Specific performance cannot be decreed if the contract leaves some of its terms open for future treaty or to be afterward settled: *Metcalf v. Hart*, 3 Wyo. 513; 31 Am. St. Rep. 122, and note. This subject is fully discussed in the extended note to *Atwood v. Cobb*, 26 Am. Dec. 664.

NASH v. MINNESOTA TITLE INSURANCE AND TRUST COMPANY.

[163 MASSACHUSETTS, 574.]

MISREPRESENTATIONS, WHEN NOT ACTIONABLE.—If a person making representations acts gratuitously, honestly intending to tell the truth, he cannot be held answerable to other persons, although his statements understood according to their seeming meaning be ever so misleading. Mere negligence, ignorance, or stupidity on his part do not constitute fraud.

TORT.—THE GENERAL TEST TO DETERMINE WHETHER THERE IS A LIABILITY in an action of tort is to inquire whether the defendant has by act or omission disregarded his duty to the plaintiff.

MISREPRESENTATIONS, LIABILITY FOR.—If one makes a statement for a consideration as a part of a contract, it is his duty to be accurate, and mistake or ignorance on his part will not relieve him from liability. But one who merely answers the inquiries of a stranger or volunteers information in a matter which does not concern him is in the position of a gratuitous bailee of property, from whom a less degree of care is required than from a bailee for hire. He must not intentionally mislead, but if he answers honestly to the best of his ability, he does his whole duty, and cannot be held liable because he was ignorant or stupid.

MISREPRESENTATIONS, EVIDENCE TO SHOW WHAT WAS MEANT.—One sued for misrepresentations made by him, to be acted upon by others, should be permitted to testify to his understanding in regard to the meaning of his representations. Hence, where defendant had made a statement, which, according to the ordinary signification of words, implied that certain lands were free from encumbrances, when in fact he knew they were subject to encumbrances, was sued by persons who acted on such statement to their alleged injury, it was held that the trial judge erred in excluding evidence offered by the defendant for the purpose of showing that the words were not used in the sense in which they were interpreted by the court, and that he acted honestly and without intention to state anything falsely.

MISREPRESENTATIONS, DAMAGES, MEASURE OF.—If persons make a representation in a matter in which they expect others to act upon their statements, by the aid of which a third person fraudulently induces another to act or contract, and because of which fraud he is entitled to and does rescind the contract, he cannot recover of the persons making the representations the whole amount paid as if no contract had ever existed. His damages must be restricted to the difference between the value of the things as they actually existed and their value as they were represented to be.

RESCISSION.—THE FRAUD OF A THIRD PARTY inducing the purchase of goods cannot entitle the purchaser to rescind. If the seller is not a party to the fraud the contract must stand.

MISREPRESENTATION, RESCISSION, WHEN DOES NOT DEFEAT THE RIGHT TO RECOVER FOR.—If a third person makes a misrepresentation by the aid of which the owner of property, by the fraudulent use of the misrepresentation, is enabled to sell it, and the purchaser, discovering the fraud and misrepresentation, elects to rescind, this will not destroy his right to recover of the person making the misrepresentation the damages suffered thereby, so long as the purchaser has failed to obtain satisfaction, for his injury either by the restoration or recovery of the consideration, or otherwise.

MISREPRESENTATION, DAMAGES, MITIGATION OF BY SUBSEQUENTLY MAKING FACTS AS REPRESENTED.—If a misrepresentation is made respecting the title to property by stating that it is free from encumbrances, upon which third persons act and were intended to act, and a cause of action has arisen in their favor on account thereof, for which they have brought an action, it cannot be proved in mitigation of damages that the defendant has procured an assignment of the encumbrances and tendered a discharge of them to the plaintiffs at the trial.

EVIDENCE.—A LETTER FROM THE PRESIDENT OF A CORPORATION saying that D. says he sold to the person to whom the letter was addressed certain bonds is admissible against the corporation as tending to prove that a sale had been made as D. said it had.

ELEVEN cases in which plaintiffs sought to recover for false and fraudulent representations alleged to have been made by the defendant, and whereby they were induced to purchase certain bonds. The representations were contained in a letter, of which the following is a copy:

“MINNEAPOLIS, MINN., Feb. 6, 1890.

“MR. GEORGE W. DAVIS, Minneapolis, Minn.

“*Dear Sir:* We have in our possession the original documents printed in the advertisement of your bonds secured by mortgage to this company as trustee upon the Hedderly tract in this city. We indorse the estimates of values contained therein made by Messrs. Marsh and Bartlett, I. C. Seeley, Jones, McMulland & Co., and E. A. Harmon, all of whom are known as men of integrity and sound judgment touching local real estate value. That we consider the title good in you will appear from the fact that we have engaged to issue our policies of title insurance to the several holders of your mortgage bonds to the aggregate amount of \$150,000, fully protecting such holders against loss or damage arising from any defect in said title or prior encumbrance thereon. From our knowledge of the mortgaged property, and from its situation and prospects, we are of opinion that the mortgaged property is adequate security for the amount of your proposed loan. Yours very truly,

“MINNESOTA TITLE INSURANCE & TRUST COMPANY,

“J. U. BARNES, President.”

The defendant was a corporation doing business at Minneapolis, and it was alleged by the plaintiffs that it undertook the duty of examining and insuring titles, and of acting as trustee under trust deeds and mortgages, and sent out circulars to that effect, whereby it was enabled to do and had done a large business in the state of Massachusetts; that in February, 1890, an arrangement was effected between it and George Walter Davis, whereby it received a conveyance of a certain tract of land in Minneapolis in trust for the payment of one hundred and fifty thousand dollars of bonds to be issued by Davis, and contracted to issue to each purchaser a policy of title insurance insuring the lands to be free from encumbrances; that to induce persons to whom Davis might offer the bonds to become purchasers the defendant gave the letter hereinbefore set forth, fraudulently representing the tract to be free from encumbrances, when in fact it was known

by the defendant and its representatives to be subject to a prior mortgage to secure the sum of thirty thousand dollars; that the letter was shown by Davis to plaintiffs, who, in reliance thereon, were induced to and did purchase seven of the bonds aggregating six thousand five hundred dollars, which, with an accompanying policy of title insurance executed by the defendant, were delivered to the plaintiffs; that in the year 1891 plaintiffs discovering the misrepresentations elected to rescind, notified Davis thereof, and tendered to him the bonds, with interest since the purchase, and also the title insurance policy, and demanded of him the repayment of the amounts paid to him for the bonds; that Davis refused to make this repayment, and thereafter the plaintiffs notified the defendant of the rescission and of Davis' declining to receive back the bonds, and made the same demand upon and tender to the defendant which they had made to Davis; that defendant refused to pay to plaintiffs any of the sums demanded. The effect of the letter in question was considered upon the former appeal of the case, in which the court said: "One of the false representations contained in this letter purports to be a statement of a fact, and it was known by the defendant's officers to be untrue. The statement in regard to the title, while it was not a direct affirmation that there was no encumbrance on the property, was intended to produce a belief among purchasers of the bonds that the title was perfect, and it was rightly understood as a representation to that effect." On the second trial of the case the trial judge ruled that the plaintiffs, other than the plaintiff Jeremiah Plympton, were entitled to recover the amount paid by them for the bonds with interest less the amount of interest received thereon. The defendant offered to prove that about the time the prior mortgage became due, it took an assignment thereof, and subsequently prepared a valid discharge of the mortgage, which it brought into court and tendered to the plaintiffs. The trial judge ruled that these facts were not admissible in mitigation of damages. Jeremiah Plympton, having died since the first trial, his evidence given thereon was read, in which he testified that he was one of the plaintiffs; that he had business with the defendant prior to February, 1890; had no recollection of ever having seen its prospectus; had purchased two bonds, and before purchasing had seen the letter of February 6th, and that he was principally induced to buy the bonds by the statement of the presi-

dent of the company. Plympton had sold his bonds, and on the instruction of the judge the jury returned a verdict in his favor for the sum of three hundred dollars. Verdicts were also returned in favor of the other plaintiffs severally.

R. M. Morse & J. W. Keith, for the plaintiffs.

A. A. Strout & E. L. Rand, for the defendant.

⁵⁷⁷ KNOWLTON, J. These cases have once before been considered by this court (see *Nash v. Minnesota Title etc. Co.*, 159 Mass. 437), and the principal question then raised was whether there was any evidence of fraud on the part of the defendant. It was held that the defendant's statement in regard to the title, taken in connection with the context of the letter and the circumstances under which it was written, purported to be a representation that the defendant had examined the title to the mortgaged real estate, and had found it to be perfect. The property was subject to a prior mortgage of thirty thousand dollars, as the defendant's officers well knew. On this part of the case the only question was whether there was any evidence of fraud to submit to the jury; not whether there might be explanations which would relieve the defendant from the imputation against it. At the last trial the defendant offered to show that the words were not used in the sense in which they were understood by this court, and that its officers acted honestly, and that there was no intention on their part to state anything falsely. The evidence was rejected, and the ruling was, in substance, that, in view of the admitted facts that the defendant's officer knew of the existence of the prior mortgage, and that this letter was to be used to induce persons to buy the mortgage bonds, the representation was, as matter of law, fraudulent. The exception to this ruling presents the question, ⁵⁷⁸ What must be proved to establish a charge of an actionable false and fraudulent representation? On the precise question now before us the law of England has been finally settled by the case of *Derry v. Peek*, 14 App. Cas. 337, in which it was held unanimously that in an action of deceit there can be no recovery unless fraud is proved. In delivering the principal opinion, Lord Herschell said: "I think the authorities establish the following propositions: 1. In order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. 2. Fraud is proved when it is shown that a false representation has been made (1)

knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false has obviously no such honest belief. 3. If fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made." In other parts of the opinion, and in the opinions of the other law lords in the same case, and in other cases which have since been decided, it is made clear that by the law of England mere ignorance or negligence or stupidity on the part of the person making the representations does not constitute fraud if he intends honestly to tell the truth, although his statements, understood according to their seeming meaning, may be ever so misleading: *Glasier v. Rolls*, 42 Ch. Div. 436; *Angus v. Clifford* (1891), 2 Ch. 449; *Le Lievre v. Gould* (1893), 1 Q. B. 491. In this particular the decisions in this commonwealth are of similar import: *Tryon v. Whitmarsh*, 1 Met. 1; 35 Am. Dec. 339; *Page v. Bent*, 2 Met. 371; *Pearson v. Howe*, 1 Allen, 207; *King v. Eagle Mills*, 10 Allen, 548; *Hartford Live Stock Ins. Co. v. Matthews*, 102 Mass. 221; *Fisher v. Mellen*, 103 Mass. 503; *Chatham Furnace Co. v. Moffatt*, 147 Mass. 403; 9 Am. St. Rep. 727; *Holst v. Stewart*, 154 Mass. 445. See, also, *Page v. Parker*, 40 N. H. 47; *Hammatt v. Emerson*, 27 Me. 308; 46 Am. Dec. 598; *Marsh v. Falker*, 40 N. Y. 562; *Chester v. Comstock*, 40 N. Y. 575, note; *Cowley v. Smyth*, 46 N. J. L. 380; 50 Am. Rep. 432.

There is a good reason for this rule. The general test to determine whether there is a liability in an action of tort is the question whether the defendant has by act or omission disregarded his duty. In applying this test, it is always necessary first to inquire what the defendant's duty is. In an action of deceit the defendant is ordinarily sued as one whose only relation to the transaction was that of a gratuitous informer, who had no interest in the subject to which the representations related. On the necessary allegations of the declaration he may be assumed to have answered inquiries

put by a stranger, or to have volunteered statements out of apparent friendship. Under such circumstances, although he thinks that his statements will be acted upon by the inquirer, he has no higher duty than to answer honestly and in good faith. If one makes a statement for a consideration as a part of a contract, it is his duty to be accurate, and ignorance or mistake will not relieve him from the consequences of an error. In seeking a remedy from him for a mistake so made, the plaintiff in his declaration states his relation to the transaction, and sues in contract. But one who merely answers the inquiries of a stranger, or courteously volunteers information in a matter which does not concern him, is in a position analogous to that of a gratuitous bailee of property, from whom a less degree of care is required than from a bailee for hire. He must not intentionally mislead; but if he answers honestly to the best of his ability he does his whole duty. If he is an ignorant, stupid man, and on that account the inquirer is led astray, it is not his fault, but the fault or misfortune of the person who relies upon him. It would be unjust to visit upon him the consequences of his ignorance in a matter in which he had no interest.

If he happens to have an interest in the subject to which his representations relate, it is a matter of which the law takes no cognizance in an action of deceit. It is not necessary to allege or prove it; and proof of it does not affect the rights of the parties, unless the proof goes far enough to create a liability of another kind.

Of course one will be presumed to have intended his language ⁵⁸⁰ to be understood according to its usual meaning, and in ordinary cases, in the absence of a reasonable explanation of his mistake, his testimony that he meant something different from what he said will have but little, if any, weight. But inasmuch as the question involved is what was his state of mind, and his actual intent as distinguished from his apparent intent, he is entitled to explain his language as best he can, if it is susceptible of explanation, and to testify what was in his mind in reference to the subject to which the alleged fraud relates. In this respect his expressions, whether spoken or written, are not dealt with in the same way as when the question is what contract has been made between two persons who were mutually relying upon the language used in their agreement: *Hazard v. Loring*, 10 Cush. 267; *Thacher v. Phinney*, 7 Allen, 146; *Brown v. Mas-*

sachusetts Title Ins. Co., 151 Mass. 127; *Snow v. Paine*, 114 Mass. 520, 526; *Edwards v. Carrier*, 48 Me. 474; *Norris v. Morrill*, 40 N. H. 395, 401; *Gifford v. Thomas*, 62 Vt. 34, 35; *Seymour v. Wilson*, 14 N. Y. 567; *Thurston v. Cornell*, 38 N. Y. 281; *Phelps v. George's Creek etc. R. R. Co.*, 60 Md. 536; *Berkey v. Judd*, 22 Minn. 287.

In the present case we need not determine whether the excluded evidence on this subject was very important. It is obvious that, if the defendant's officers knew that their statement in regard to the title was false in the sense in which they supposed it would generally be understood, it is immaterial whether or not they had a purpose to do injury or cause loss to anybody who might rely upon it. It is enough to furnish the foundation for a liability, if they used language in regard to the title which they intended should be understood as a representation that the title was perfect when they knew it was not perfect: *Forbes v. Howe*, 102 Mass. 427; 3 Am. Rep. 475; *Nash v. Minnesota Title etc. Trust Co.*, 159 Mass. 437; *Commonwealth v. Coe*, 115 Mass. 481; *Spaulding v. Knight*, 116 Mass. 148. But a majority of the court are of opinion that it was competent for them to testify what their understanding was in regard to the meaning of the representation, and that the presiding justice gave too broad an interpretation to our former decision in the case.

The next exception relates to the rule of damages. The presiding ⁵⁹¹ justice ruled that, on a rescission of the contract for fraud, the plaintiffs could recover back from this defendant the whole consideration paid for the bonds. That is the rule where the suit is between the original contracting parties. The reason of the rule is that on a rescission of a contract the contract is avoided *ab initio*, and the rights of the parties in reference to the subject matter of it are as if no contract had ever been made: *Milliken v. Thorndike*, 103 Mass. 382; *Rassett v. Brown*, 105 Mass. 551; *Nealon v. Henry*, 131 Mass. 153; *Ballou v. Billings*, 136 Mass. 307, 309; *Snow v. Alley*, 144 Mass. 546; 59 Am. Rep. 119. But the defendant in this case is a stranger to the consideration, and his relation to the contracting parties is not such as to make this reason applicable. The rule of damages in an action against a tort-feasor is that the plaintiff shall recover an amount commensurate with the wrong done him. In a suit for a fraud in a sale of personal property, the measure of damages in common cases is the difference between the actual value of

the goods and their value as it would have been if the representation had been true. This will ordinarily make good the loss of the defrauded party: *Morse v. Hutchins*, 102 Mass. 439; *Page v. Parker*, 43 N. H. 363; 80 Am. Dec. 172; *Northrop v. Hill*, 57 N. Y. 351, 357; 15 Am. Rep. 501. That is the general rule in cases like the present, and the important question before us is, whether there is anything in the facts disclosed that warrants the application of a different rule.

It is clear that mere fraud of a third party which induces the purchase of goods will not give the purchaser a right to rescind the contract. If the seller is not a party to the fraud, the contract must stand: *Root v. Bancroft*, 8 Gray, 619; *White v. Gravis*, 107 Mass. 325; 9 Am. Rep. 38; *Martin v. Campbell*, 120 Mass. 126; *Fort Dearborn Nat. Bank v. Carter*, 152 Mass. 34, 38; *Pulsford v. Richards*, 17 Beav. 87, 95; *Masters v. Ibberson*, 8 Com. B. 100. It is clear, therefore, in such a case, that the injured party can recover damages for the injury only under the common rule. Looking then only at the relations of the parties to this suit to each other, without regard to the conduct of the seller of the bonds, it will be conceded that there is no right of rescission, and no right to recover back the consideration. If we assume, as we well may on the facts of this case, that the seller was a party to the fraud and knowingly received the benefit of it, there is a ⁵⁹² right of rescission and a right to recover back the consideration in favor of the plaintiff as against him. But that right grows out of the conduct of the seller of the bonds in practicing the fraud, and it does not bring the defendant corporation into any relation to the consideration, nor make it a party to the contract, nor create any new rights in favor of the plaintiff against it: *Wyeth v. Morris*, 13 Hun, 338; *Marston v. Singapore Rattan Co.*, 163 Mass. 296. As a preliminary to the right to sue for the consideration, there must be a return or a tender of return of the property that will put the other party *in statu quo*. The plaintiff, having made a tender of the bonds to Davis, the seller of them, who refused to receive them, made a similar tender to the defendant. There is a manifest inconsistency between an attempt to get back the consideration from Davis on the ground that the property in the bonds was returned to him by reason of the rescission, and an attempt to turn over the property to the defendant without the consent of Davis, and thereby to make it accountable for the money originally paid to Davis.

In rescinding a contract and in enforcing rights growing out of such rescission, one would expect to look only to the other party to the contract. The nature and effect of rescission are such that they can have no consequences as against the other party to the contract. The only injury which the law recognizes as done to the plaintiff by the defendant in this case was by a false representation that the title to the property was perfect. Whatever the plaintiffs may have suffered from other causes, their loss from this cause will be made up to them if the defendant pays the difference between the value of the bonds as they were and their value as they would have been if the title had been perfect. We do not think the plaintiffs' rescission of the contract on account of the fraud defeats their right to recover these damages from a third party, so long as they have failed to obtain satisfaction for their injury, either by a restoration or recovery of the consideration, or otherwise.

The only case relied on by the plaintiffs in support of a different rule of damages is *Hedden v. Griffin*, 136 Mass. 229; 49 Am. Rep. 25. On a hasty reading of that case it might seem to be an authority in favor of the plaintiffs' contention on this point, but a more careful examination will show that it is not. No such question as ⁵⁸³ that now before us was raised or considered in that case. The question was whether the plaintiff, who had been induced by the fraud of an agent of a life insurance company to take out a policy of life insurance, could, on discovering the fraud six months afterward, rescind the contract, return his policy, and recover back the premium paid. He had enjoyed protection for six months under a policy which the company could not avoid, and if he had deceased before discovering the fraud his administrator might have collected from the company the sum of ten thousand dollars; but it was held that he was not thereby precluded from rescinding the contract and recovering back the consideration, less the value, if any, of the insurance which he had received under the contract. It was intimated in the opinion, although not decided, that he could recover back the whole consideration, without any deduction for the protection which he had before rescinding the contract. The transaction was not a sale of goods, but a contract for the most part executory. So far as the contract was still executory at the time of the discovery of the fraud, he plainly should have a right to rescind: See *Fisher v. Metropolitan Ins. Co.*, 160 Mass.

386; 39 Am. St. Rep. 495; 162 Mass. 236. What the rule would be if such a policy remained in force a much longer time before discovery of the fraud was not stated, but no question was made in the case in regard to the right to recover of the agent who committed the fraud to the same extent as if the suit had been against the principal. Under the facts of that case, such a question could not successfully have been raised by the defendant. The money which was obtained by the fraud was paid into his hands by the plaintiff. On a rescission of the contract, the contract was annihilated, and after a demand the guilty agent could not justify under it either his payment of the money to his principal or a longer detention of it by himself. Plainly, the plaintiff was entitled to recover back from him the money which was paid into his hands less the deduction, if any, which ought to be made for the insurance which the plaintiff had before discovering the fraud.

The defendant contends that it should have been permitted to show, in mitigation of damages, that it had procured an assignment of the mortgage, and that it tendered a discharge of it to the plaintiffs at the trial; but we are of opinion that the ruling ⁵⁹⁴ on this point was correct. The defendant may hold and use its mortgage in any lawful way, but the plaintiffs ought not to be compelled to receive the discharge of it in mitigation of their damages after the expiration of so long a time. If the mortgage were discharged, it would not, as matter of law, limit their recovery to nominal damages. If there had been no encumbrance, they might long ago have sold the bonds on better terms than can be obtained now. Moreover, the commission of the fraud, if fraud is proved, was a willful wrong, and the case is analogous to a willful conversion of property, and an offer to return it in mitigation of damages after its condition has changed and its value has depreciated: *Stickney v. Allen*, 10 Gray, 352; *Dahill v. Booker*, 140 Mass. 308, 310; 54 Am. Rep. 465; *Bigelow Co. v. Heintze*, 53 N. J. L. 69; *Yale v. Saunders*, 16 Vt. 243; *Rutland etc. R. R. Co. v. Middlebury Bank*, 32 Vt. 639. Practically, it might be difficult in this case to measure the amount that should be allowed now on account of a discharge of the mortgage in mitigation of damages, and we are of opinion that we ought not to compel the plaintiffs to accept the tender, or to make an allowance in the assessment of damages as if they had accepted it.

The evidence of J. Plympton was rightly received. The declaration in his case is sufficient to justify a recovery of damages on the theory on which his case was presented to the ⁵⁸⁵ jury. If everything alleged in regard to rescission is stricken out, enough remains upon which to found the verdict. The letter of September 8, 1890, from Barnes to James M. Keith was competent. It was not only a statement that Davis said he sold bonds through Keith, but it was an assumption that what he said was true. It implied that the information had been communicated in such a way, and under such circumstances, as to be trustworthy, and as against the defendant it was in the nature of an admission that the sale had been made as Davis said it had.

We think that there is no occasion to consider more particularly the questions argued by the defendant. Such of them as ⁵⁸⁶ are not covered by what we have already said will not be likely to arise at another trial.

Exceptions sustained.

HOLMES, J. I am unable to agree with the decision reached by a majority of the court on the first point discussed by them. I will not, in this place, go into any extended discussion of general principles. If I were making the law, I should not hold a man answerable for representations made in the common affairs of life without bad faith in some sense, if no consideration was given for them, although it would be hard to reconcile even that proposition with some of our cases. But the proposition, even if accepted, seems to me not to apply to this case. The proper meaning of the words used by the defendant has been settled by this court already: *Nash v. Minnesota Title Ins. & Trust Co.*, 159 Mass. 437. The representation was not made in casual talk, but in a business matter, for the very purpose of inducing others to lay out their money on the faith of it. When a man makes such a representation, he knows that others will understand his words according to their usual and proper meaning, and not by the accident of what he happens to have in his head, and it seems to me one of the first principles of social intercourse that he is bound at his peril to know what that meaning is. In this respect it seems to me that there is no difference between the law of fraud and that of other torts, or of contract or estoppel. If the language of fiction be preferred, a man is conclusively presumed in all parts of the law to contemplate

the natural consequences of his act, as well in the conduct of others as in mechanical results. I can see no difference in principle between an invitation by words and an invitation by other acts, such as opening the gates of a railroad crossing (*Brow v. Boston etc. R. R. Co.*, 157 Mass. 399), or an intentional gesture, having as its manifest consequence, according to common experience, a start and a fall on the part of the person toward whom it is directed, in either of which cases I suppose no one would say that a defendant could get off by proving that he did not anticipate the natural interpretation of the sign. Of course, if the words used are technical, or have a peculiar meaning in the place where they were used, this can be shown; if, by the context, or the subject matter, or the circumstances, the customary meaning of the words is modified, this can ⁵⁸⁷ be shown by proof of the circumstances, the subject matter, and the context; but when none of these things appears, a defendant cannot be heard to say that, for some undisclosed reason he had in his mind, and intended to express by the words, something different from what the words appear to mean, and were understood by the plaintiff to mean, and are interpreted by the court to mean, whether the action be in tort or contract.

Neither, in my opinion, are there any peculiar safeguards set up about the action for deceit. That action was given by the common law for any false statement of present facts of which the defendant took the risk, and which was followed by damage. He might take the risk at different points in different cases. A false warranty used to be laid as a deceit in tort for a false and fraudulent representation: Clift on Entries, 932, pl. 40; Liber Placitandi, 40, pl. 54, 55; Year Book, 11 Edw. IV., pl. 10. So even an implied warranty: *Brown v. Edgington*, 2 Man. & G. 279; Year Book, 11 Edw. IV., 6 b; Keilways' English Reports, 91, pl. 16. Yet it was not necessary to lay the scienter, or, if you laid it, to prove it, for the plain reason, as Shaw, C. J., puts it, in substance, that the defendant is answerable for the facts, however honest he may have been: *Norton v. Doherty*, 3 Gray, 372, 373; 63 Am. Dec. 758; *Schuchardt v. Allens*, 1 Wall. 359, 368; *Williamson v. Allison*, 2 East, 446; *Gresham v. Postan*, 2 Car. & P. 540; *Denison v. Ralphson*, 1 Vent. 365, 366. In the last century an alternative form in assumpsit was introduced (*Stuart v. Wilkins*, 1 Doug. 18, 21, Lawrence, J., and *Williamson v. Allison*, 2 East, 446, 451), and it may be that

now we should require the warranty to be alleged, which has the advantage of telling the defendant more exactly what the case is against him: *Cooper v. Landon*, 102 Mass. 58. But there is no doubt about the common law. I am of opinion, as I have stated, that in a case like the present a man takes the risk of the interpretation of his words as it may afterward be settled by the court.

I am authorized to say that the chief justice agrees with the foregoing dissent.

DAMAGES SUFFERED BY ONE PERSON FROM MISREPRESENTATIONS OF ANOTHER, WHEN RECOVERABLE.—This question is fully discussed in the extended notes to *Wells v. Cook*, 88 Am. Dec. 442-444, and *Zabriskie v. Smith*, 64 Am. Dec. 559, and *Cottrill v. Krum*, 18 Am. St. Rep. 555. An action lies against a third person for false affirmations to the purchaser of property respecting its value and the price paid for it by the vendor, accompanied by promises to aid the purchaser in getting it at that price where the party making them knows them to be false, and the purchaser confiding therein purchases the property at a price beyond its real value: *Medbury v. Watson*, 6 Met. 246; 39 Am. Dec. 726, and especially note.

MISREPRESENTATIONS—FRAUD—NECESSITY FOR ACCURATE KNOWLEDGE.—Whether representations are made innocently or knowingly they operate equally as a fraud upon a party who relies upon them, provided they are false and made unqualifiedly as of the party's own knowledge: *Bullitt v. Farrar*, 42 Minn. 8; 18 Am. St. Rep. 485, and note; *Gould v. York County etc. Ins. Co.*, 47 Me. 403; 74 Am. Dec. 494, and note; *Tyson v. Passmore*, 2 Pa. St. 122; 44 Am. Dec. 181, and note. An affirmation of what one does not know or believe to be true is equally as unjustifiable as the affirmation of what is known to be positively false: *Juzan v. Toulmin*, 9 Ala. 662, 44 Am. Dec. 448, and note. The ground of liability in actions of fraud and deceit that renders the defendant amenable to an action in tort rests upon the affirmation of some existing fact the party making it knows or has good reason to know is false: *People v. Healy*, 128 Ill. 9; 15 Am. St. Rep. 90. See the extended note to *Cottrill v. Krum*, 18 Am. St. Rep. 559.

FRAUD.—DAMAGES are entitled to be recovered in an action for fraud adequate to the injury sustained, as a general rule, if the plaintiff succeeds: *Campbell v. Hillman*, 15 B. Mon. 508; 61 Am. Dec. 195, and note. See, also, the extended note to *Cottrill v. Krum*, 18 Am. St. Rep. 562.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

PETRIE v. BADENOCH.

[102 MICHIGAN, 45.]

▲ TRUSTEE CANNOT BUY UP A DEBT OR ENCUMBRANCE for which a trust estate is answerable for less than is actually due thereon, and make a profit for himself. Such purchase inures for the benefit of the trust estate, and the cestui que trust is entitled to the advantage of the purchase.

RES JUDICATA. — **AN EQUITABLE DEFENSE NOT PLEADED** in an action at law does not become res judicata. Hence, a defendant sued on a promissory note and submitting to the recovery of judgment thereon is not precluded from maintaining a bill in equity on the theory that the note was purchased by his trustee out of trust funds at a discount, but in the name of the judgment creditor, and a court of equity may restrain the enforcement of the judgment, and compel the holder to accept payment out of the trust funds, and limit the amount to be paid to the sum actually paid out by the trustee.

Bunker & Carpenter, for the complainant.

Sessions & Bassett, for the defendants.

46 McGRATH, C. J. This is a branch of the Petrie-Torrent litigation: 88 Mich. 43; 100 Mich. 117.

Complainant's bill alleges that on October 4, 1890, Petrie gave to one Marshall, of Chicago, his note for two thousand four hundred and fifty dollars; that about January 15, 1892, Torrent purchased the note from the payee through one Meglade, of Chicago, for thirteen hundred and seventy-five dollars; that Torrent then put the note in the hands of defendant Badenoch, in order that judgment might be had for the full value of the note; that Badenoch brought suit on the note and garnished Torrent; that on January 19,

1893, Badenoch recovered judgment on the note in the circuit court for the county of Muskegon for two thousand eight hundred and forty-three dollars and two cents; that Badenoch was not the owner of the note at the time suit thereon was brought, is not now the owner thereof, nor is he the owner of the judgment thereon, or any part thereof; that, at the time of the purchase of said note, Torrent was, and ever since has been, complainant's trustee, and at the time of the purchase of the note said Torrent had in his hands, as such trustee, upwards of ⁴⁷ eighty-five thousand dollars of complainant's money; that the defendant Torrent purchased said note, and caused suit to be brought thereon in the name of Badenoch, for the purpose of taking an unfair, unauthorized, inequitable, and fraudulent advantage of Petrie, and of making a profit out of his fiduciary relation by buying said note at a discount, and by seeking by indirect means, fully set forth in the bill of complaint, to enforce a claim against Petrie, not at what he paid for said claim, but at the face value of the note; and that the defendant Badenoch was the plaintiff in said cause for no other purpose, and that said suit was prosecuted for no other purpose, than to give, by said indirect means, to the defendant Torrent an unfair, unauthorized, inequitable, and fraudulent advantage of Petrie. The bill further alleges Petrie's willingness to pay to Torrent and to allow in the accounting whatever Torrent paid for the note, together with interest thereon from the time of its purchase.

Complainant prays that said note and judgment may be declared to be the property of Torrent, and that the bringing of said suit and the obtaining of judgment therein may be declared and decreed to be in fraud of the rights of the complainant, and that the defendant Torrent may be compelled to satisfy said note and judgment out of the moneys in his hands belonging to complainant, at what he paid for said note, together with interest thereon from the time of said payment, and that all proceedings in the suit at law and in the garnishment suit be permanently stayed. The bill filed by complainant against Torrent in the case reported as aforesaid, and the decree therein, are referred to and made a part of the bill in the present case.

Defendants demurred to the bill, the demurrers were overruled, and defendants appeal.

It is well settled that a trustee cannot use the trust prop-

erty, nor his relation to it, for his own personal ⁴⁸ advantage. He cannot buy up a debt or an encumbrance for which the trust estate is liable for less than is actually due thereon, and make a profit to himself, but such purchase inures for the benefit of the trust estate, and the cestui que trust shall have all the advantage of such purchase: Perry on Trusts, sec. 428; Lewin on Trusts, 276. He should take no advantage of his position to receive personal gain from the trust property, his duty being to protect it, and that, too, without having an adverse interest: *Parshall's Appeal*, 65 Pa. St. 233; *Sloo v. Law*, 3 Blatchf. 459. He cannot buy up debts against or incumbrances upon the estate at a discount without accounting to the estate, or the party having the beneficial interest therein, for the full benefit: *King v. Cushman*, 41 Ill. 31; 89 Am. Dec. 366; *Slade v. Van Vechten*, 11 Paige, 21; *Schoonmaker v. Van Wyck*, 31 Barb. 457; *Barksdale v. Finney*, 14 Gratt. 338.

While conceding the rule, counsel for defendants would make its applicability depend upon the extent of the trust. It is, however, the particular estate which is held in trust that is here sought to be affected. The note was purchased and placed in the hands of a third person, in order to reach by garnishment the money or estate held in trust, and offset the amount against a claim therefor. Is it not evident that the very relation which the rule says shall not be used for personal advantage inspired the purchase? The rule is based upon the obligation resting upon the trustee to protect the trust estate, and the possibility of adverse or conflicting interest. The only note in question was given pending a controversy, not yet ended, over this very trust fund, in which it is strenuously urged that large sums of money are being wrongfully withheld. It is by no means clear but that in such case the purchase should be treated as having been made with the trust funds. Procrastination may be made profitable if the obligations ⁴⁹ of the cestui que trust, the issue of which may have been made necessary by the very delay or withholding, may be purchased at a large discount, and then offset at their face value against the sum due.

It is urged, however, that the question may be disposed of in the principal suit upon the accounting; but defendant Badenoch is a necessary party in a proceeding to obtain the relief here prayed.

It is also insisted that the matter involved in this suit has

been determined by the suit at law, and is *res judicata*; but the defense here sought to be established was not available in the suit at law. The matters involved, to wit, the conduct of the trustee, and his dealings with the trust estate and in his relation as trustee, are peculiarly within the jurisdiction of a court of equity.

The decree overruling the demurrers is affirmed, with costs to complainant.

LONG, GRANT, and HOOKER, JJ., concurred.

MONTGOMERY, J., did not sit.

TRUSTS—TRUSTEES—EFFECT OF PURCHASE OF ADVERSE INTEREST BY.—
A trustee who gets an advantage by being in possession and purchases an outstanding title or encumbrance cannot use it for his own benefit, but must be considered as holding it in trust for him under whose title he entered: *Morgan v. Boone*, 4 T. B. Mon. 291; 16 Am. Dec. 153; *Green v. Winter*, 1 Johns. Ch. 27; 7 Am. Dec. 475; *Morrison v. Caldwell*, 5 T. B. Mon. 426; 17 Am. Dec. 84; *Wiswall v. Stewart*, 32 Ala. 433; 70 Am. Dec. 549, and note; *McClanahan v. Henderson*, 2 A. K. Marsh. 388; 12 Am. Dec. 412. A trustee is bound to fidelity in the interests of his trust, and will not be permitted to make profit by the relationship: *Chorpenning's Appeal*, 32 Pa. St. 315; 72 Am. Dec. 789, and note; *Miller v. Davidson*, 3 Gilm. 518; 44 Am. Dec. 715, and note. See, further, the note to *Commercial etc. Assur. Co. v. Scammon*, 9 Am. St. Rep. 620.

RES JUDICATA—WHETHER JUDGMENT AT LAW BARS SUIT IN EQUITY.
The rule that matters which have received judicial determination cannot be called again into question applies not only in the same jurisdiction, but as between courts of law and equity: *Pollock v. Gilbert*, 16 Ga. 398; 60 Am. Dec. 732, and especially note, where it is stated that a point which can be set up as a defense in equity only is not lost by being set up at law. The decision of a question in issue at law is conclusive as between the same parties in a subsequent proceeding in equity: *Sellman v. Bowen*, 8 Gill & J. 50; 29 Am. Dec. 524; *Emery v. Goodwin*, 13 Me. 14; 29 Am. Dec. 475. The principle of *res judicata* extends not only to questions of fact and law which were decided in the former suit, but also to grounds of recovery or defense which might have been, but were not, presented: *Harmon v. Auditor*, 123 Ill. 122; 5 Am. St. Rep. 502, and note.

McGEE v. CONSOLIDATED STREET RY. Co.

[102 MICHIGAN, 107.]

STREET RAILWAYS—NEGLIGENCE.—It is not negligence per se not to have a headlight attached to the dashboard of a street railway car when a municipal ordinance governing such cars only requires that they shall, after sunset, have colored signal lights in the front and rear, and such lights are in fact carried.

STREET RAILWAYS.—WHILE PEDESTRIANS HAVE A RIGHT to be upon and travel along a public highway, they are bound to take notice of the dangers incident to public travel thereon, and especially is this true where street-cars are constantly passing and repassing propelled by electricity.

STREET RAILWAYS—CONTRIBUTORY NEGLIGENCE.—One about to cross a street upon which cars are operated is bound to look in both directions before getting on the track, and, if injured by a car which he would have seen and avoided had he looked in the direction whence it was coming, he is guilty of such contributory negligence as precludes his recovery of compensation.

Kingsley & Kleinhans, for the appellant.

McGarry, McKnight & Judkins, for the plaintiff.

108 **LONG, J.** Plaintiff brought suit to recover damages for the loss of a foot, claiming it was occasioned by the negligent act of the defendant street railway company in running one of its electric cars over him. The accident occurred at the intersection of South Division street and Fifth avenue, in the city of Grand Rapids, while plaintiff was attempting to cross the company's tracks, in the dusk of a dark and wet evening, on November 26, 1892. The defendant has parallel double tracks on South Division street, which is flat and level where it crosses Fifth avenue at right angles. The company runs its southbound trains over South Division street on the west track, while its northbound trains use the east track. Plaintiff claims that about half past 5 o'clock on that evening, while he was crossing South Division street from the west, along the north crosswalk on Fifth avenue, and at the west rail of the west track, he was run against by a motor-car without a headlight, then going south at a high rate of speed, without sounding a gong or giving any note of **109** warning, and that the wheel of the car passed over his right ankle, necessitating amputation. The company claims that at the time of the accident it was only early twilight; that it was then operating its motor-car with care; that the time for putting on a headlight, according to the custom of the company, had not yet arrived, but that the car was bril-

liantly illuminated on the inside by many electric lights, and that the gong was sounded at the crossing as usual. The defendant also claims that the plaintiff was wholly at fault in heedlessly walking in front of the visible and illuminated car; and that the motorman, although he saw the plaintiff, had no notice of his intention to pass within the lines of danger until he was so near the tracks that it was too late to stop the car before the accident occurred; that the car, however, was stopped in the shortest time and space possible after the first appearance of danger, and, although the rails were wet and slippery, still it came to a halt before the second wheel could pass over the plaintiff's leg.

The city ordinance requires that "the cars of said railway, after sunset, shall be provided with colored signal lights in front and in the rear." It cannot be said that it was negligence per se not to have a headlight or light attached to the dashboard of the car, as the ordinance itself provides what kind of lights shall be carried—that is, "colored signal lights in front and in the rear"—and the testimony is uncontradicted that such lights were carried.

Plaintiff cites *Rascher v. East Detroit etc. Ry. Co.*, 90 Mich. 413, 30 Am. St. Rep. 447, on the proposition that it was negligence not to have a headlight. That case does not support that proposition. There the plaintiff was driving along a street-car track, after dark, toward a coming car, which was running at the rate of from fifteen to twenty miles an hour, and which came ¹¹⁰ suddenly upon her. The car was not lighted inside or out. It was said by this court that "it ought to be lighted in the night-time, so that its approach can be seen by other travelers; and, between twilight and dark, if not lighted, it ought to be run so slowly as to avoid collision; or else give by some signal warning of its approach."

The car in the present case was running from seven to fifteen miles per hour, and, under the ordinance, it was permitted to run fifteen miles per hour. The testimony is quite contradictory on the question whether the gong was sounded. The defendant contends that all the requirements of the city ordinance were complied with, not only in regard to lights, but also in the sounding of the warning signals, and the testimony tends strongly to show that these warnings were given.

The most important question in the case, however, relates

to the care which the plaintiff exercised in attempting to make the crossing in front of the car. The plaintiff testified that when he neared the curb, and before stepping down into the street, he looked north and south along Division street; that he saw a car coming from the south, and it had a headlight; that it was then a block or a half a block away. He then testified as follows:

"Q. Now, what was the fact as to whether you looked north or not to see if there was any car in that direction?

A. I did. I thought I was safe enough to cross. I did n't expect a car coming from the north.

"Q. Did you look to see whether there was any or not?
A. Yes, sir.

"Q. Did you see any? A. No, sir; I did n't observe any."

On cross-examination he testified as follows:

"Q. Which way did you look first, to the north or south?

111 A. Well, I was making my way home, of course, and I saw this car coming from the south with a headlight on.

"Q. Did you look at that first? Did you look at the car coming from the south first? A. Yes, sir; because I saw that car visibly, you know.

"Q. Did you notice it the other way? A. I did look the other way, and, of course, I did n't notice anything, because, if I had, I would not be caught.

"Q. Where were you when you looked to the north? A. When I looked to the north?

"Q. Yes, sir. A. It was just when I was starting across.

"Q. Before you left Division street? A. Yes, sir; when I looked up.

"Q. Just as you were going to leave Division street, you looked to the north, and did n't see anything? A. Yes, sir.

"Q. Before that you had looked to the south? A. Yes, sir.

"Q. Did you continue straight across up to the time of the accident? A. Yes, sir.

"Q. Without looking either way? A. I know I thought there was no danger of this car coming from the south. It was far enough off so that I had time enough to cross.

"Q. Were the electric lights lighted at this time? A. Not that I know of.

"Q. You think not? A. I don't think they were.

"Q. When you left Division street, did you have to step down? A. After I left Division street?

"Q. When you stepped off of Division street, did you step down into the roadway? A. Yes, sir. I stepped off of the sidewalk, you know.

"Q. Was it before you took this step that you looked north and south? A. Yes, sir.

"Q. After you took that step, just describe what you did. A. Well, I had my eye upon the car coming from the south, and I was not paying much attention to the north, because I did n't expect any car coming from the north, really.

112 "Q. You walked straight that way, and kept your eye on the car from the south? A. Yes, sir. It was far enough so that I had plenty of time to cross.

"Q. Up to the time you were hit? A. Yes, sir."

Redirect examination:

"Q. About how far is this west track of the railroad company from the sidewalk? A. The west track?

"Q. The west track of the railroad company. You say you looked to the south and north as you started to go across. How far were you from that track? How many steps would you have to take to strike the track? A. Oh, it must probably be twelve or fifteen feet.

"Q. As you started to go across, as you were walking, did you look both ways? A. Yes, sir; I did, sir."

It is therefore made certain by the plaintiff's own testimony that after he left the curb, some fifteen feet away (by actual measurement thirteen feet ten inches), he did not look to the north. During that time he had his eyes upon the car coming from the south, and he says he did not expect a car from the north. This seems to account for his not having seen the car by which he was struck. Others saw it, and testified that it was lighted inside, and carried the lights required by the ordinance. If he had looked to the north before stepping upon the first rail, he could have seen this car. It was then almost upon him. The motorman saw him when some distance away, but supposed that he would stop.

While pedestrians have the right to be upon and travel along the public highway, yet they are bound to take notice of the dangers incident to the public travel thereon, and especially is this so where street-cars are constantly passing and repassing, driven with electricity. The city authorities recognized the necessity of rapid transit, and 113 limited the cars upon that street to fifteen miles per hour. These cars are heavy, laden with motors, and they cannot at

once be stopped. They have no right to run down pedestrians, but those in charge have a right to suppose that pedestrians will not walk onto the track without looking to see if a car is coming. It is well known that these crossings are places of danger, and that cars do not stop at every crossing. Here the custom was to stop on the opposite crossing from where the plaintiff was. Plaintiff had lived in that vicinity for many years, and knew of the constant going and coming of these cars, and he was bound to know that the crossing was a place of danger. He was bound to look both ways before getting on the track. It will not do to say that he acted prudently and carefully in looking before getting off the curb, and was therefore not bound to look again because he saw no car coming from the north at that time. A car running fifteen miles an hour would pass a great distance while a pedestrian was going thirteen feet ten inches. The plaintiff was bound to look before stepping upon the place of danger.

In *Gardner v. Detroit etc. R. R. Co.*, 97 Mich. 240, it was held that a traveler was guilty of negligence in not looking in the proper direction for an approaching train, by which he was injured. It appeared in that case that when within five feet of the track, if he had looked, his view would have been unobstructed for two hundred and fifty feet in the direction from which the train approached.

In *Haight v. New York Cent. R. R. Co.*, 7 Lans. 11, a woman on foot approached the defendant's tracks on Bridge street, in the village of Amsterdam. This street crossed three tracks at right angles. Her attention was fixed upon a train passing over the third track. She passed over the first track in the rear of some freight-cars. Here she looked up the second track, but, on account of the freight-cars, ¹¹⁴ could not see very far. Then, in passing over the seven feet between the first and second tracks, she looked at the rear end of the train which had just passed over the third track, but did not look along the second track after she left the rails of the first, and, reaching the second, she was struck by a train on that track. It appeared that in the seven feet between the first and second tracks she could have seen the approaching train for several hundred feet. She did not once look down that track, but kept her eyes upon the train upon the third track. This was held to be contributory negligence as matter of law. The supreme court said: "It

is therefore quite plain that, if the plaintiff had looked in the right direction as she was about leaving the first track, she must have seen the approaching train. There was no obstruction in the way, and that she did not see or hear the train which was coming when she stepped on the track was owing to the fact that she did not look for it in the direction from whence it came. . . . She neglected to look in the right direction."

This case was cited with approval by the court of appeals in *Salter v. Utica etc. R. R. Co.*, 75 N. Y. 279.

It is said by counsel for plaintiff that, while this may be the rule in regard to steam railways, it cannot be applied to street railways. In *Carson v. Federal St. etc. Ry. Co.*, 147 Pa. St. 219, 30 Am. St. Rep. 727, it was held that failure to look for approaching cars on the part of one about to drive across the tracks of an electric street-railway company is such contributory negligence as will prevent his recovery for injuries received by colliding with a car. The court said: "If, by looking, the plaintiff could have seen, and so avoided, an approaching train, and this appears from his own evidence, he may properly be nonsuited."

In *Ward v. Rochester etc. Ry. Co.*, 17 N. Y. Supp. 427, it appeared that plaintiff's intestate was fatally injured while ¹¹⁵ attempting to drive across a street railway track. There was evidence that, at any time before reaching the track, deceased, by a glance, could have informed himself of the approach of the car, but that he drove onto the track without looking in either direction. It was held that he was guilty of contributory negligence.

In *Creamer v. West End etc. Ry. Co.*, 156 Mass. 320, 32 Am. St. Rep. 456, the supreme court of that state held that where a person stepped from a horse-car at the junction of two streets, and immediately started to cross the track of an electric road, without looking or listening, and was run over by an electric car running at the rate of fifteen miles an hour, there could be no recovery, because the deceased was not exercising due care.

We see no more reason for applying the rule that one must look and listen before crossing the tracks of a steam railway than that one must look and listen before crossing a street-car track upon which the motive power is electricity or the cable. In this state it is well settled that persons passing over railroad crossings must exercise care. They must look

and listen, and, under certain circumstances, must stop, before attempting the crossing. Electric street-car crossings are also places of danger. The cars are run at a great speed on this street in question. The city ordinance permits it, and the rule must be that, before going upon such tracks, every person is bound to look and listen. If the view is unobstructed, and the pedestrian takes this precaution, there is not much opportunity for him to be injured. It will not do to say that he has discharged his responsibility in case of an accident by looking when some feet away, for he may miscalculate the distance and the speed of the car. To avoid danger, he must look just before he enters upon the track. This was the rule laid down by this court in *Houghton v. Chicago etc. Ry. Co.*, 99 Mich. 308. The uncontradicted evidence ¹¹⁶ shows that the car was lighted with five electric lights inside, and carried the signal lights required by the ordinance. Others saw these lights, and it does not seem to be disputed that, had the plaintiff looked just before going upon the track, he would have seen the car.

Defendant requested the court to charge the jury that under the evidence the plaintiff could not recover. This request should have been given upon the facts shown by this record. The other questions do not become important.

Judgment is reversed, and a new trial ordered.

GRANT, and HOOKER, JJ., concurred with LONG, J.

McGRATH, C. J., concurred in the result.

MONTGOMERY, J., did not sit.

STREET RAILWAYS—DUTY TO CARRY HEADLIGHTS.—In an action to recover for injury received in a collision with a car while driving upon a street railway track in the night-time evidence is admissible to show that the public were in the habit of driving and traveling upon such track, as bearing upon the question of negligence in running a car at night without a headlight or other light of any kind: *Rascher v. East Detroit etc. Ry. Co.*, 90 Mich. 413; 30 Am. St. Rep. 447.

STREET RAILWAYS—DUTY OF PERSONS CROSSING TRACK TO LOOK AND LISTEN.—A person about to cross a street railway track need not stop, but he must look and listen so as to avoid walking directly in front of a moving car, and if he fails to look and listen he is guilty of contributory negligence, and cannot recover for injuries resulting from being struck by the car: *Carson v. Federal Street etc. Ry. Co.*, 147 Pa. St. 219; 30 Am. St. Rep. 727, and note. Street railways, when in the exercise of due care, are not liable to a person who in a careless and reckless way runs suddenly in front of a moving car and is injured before there is time to stop it: *Driscoll v. Market Street etc. Ry. Co.*, 97 Cal. 553; 33 Am. St. Rep. 203, and note.

**ZAGELMEYER v. CINCINNATI, SAGINAW AND MACK-
INAW RAILROAD COMPANY.**

[102 MICHIGAN, 214.]

RAILWAY CORPORATIONS—ADDITIONAL CHARGE WHEN TICKETS ARE NOT PURCHASED AT STATION.—Railway corporations cannot exact as a penalty for not purchasing a ticket before entering the cars an additional charge, which, when added to the regular rate, will make the sum exacted exceed the maximum charge allowed by law.

RAILWAY CORPORATIONS—MEASURE OF DAMAGES FOR BEING EJECTED FROM A CAR.—A passenger ejected from a railway car because he will not pay a sum in excess of that the corporation is allowed to charge is entitled to substantial damages, though he might have avoided such ejection by paying the unlawful exaction, amounting to only ten cents.

RAILWAY CORPORATIONS CANNOT CHARGE FOR A FRACTION OF A MILE unless it is so large a fraction as to make the charge of one cent or more not in excess of three cents per mile permitted by law.

Shepard & Lyon, for the appellant.

Simonson, Gillett & Courtright, for the plaintiff.

215 MONTGOMERY, J. This action is brought to recover damages for being forcibly ejected from defendant's car, while riding as a passenger.

The defendant had adopted a regulation requiring conductors to make an additional collection of ten cents on all fares paid by passengers taking defendant's trains from regular ticket stations. A notice had been posted in defendant's cars, which read: "Passengers will save ten cents on each fare by purchasing tickets before entering the cars."

Plaintiff, without buying a ticket, boarded a car on defendant's train at North Saginaw, bound for Salzburg, as he testifies, or West Bay City, according to the testimony of the conductor. When the conductor asked him for his fare, plaintiff tendered him a fifty-cent piece, and said he would pay him the legal and lawful rate, but would not pay an extra ten cents because he had not purchased a ticket. The conductor thereupon forcibly expelled him from the train. Plaintiff recovered judgment of five hundred dollars, and defendant brings error.

1. Defendant contends that the requirement of passengers that they pay an additional sum of ten cents for failure to purchase tickets where there are stations is a reasonable regulation within the power of the company to make. Numerous cases have been cited by defendant's counsel in which it has been held that such a regulation, requiring the payment

of a small sum in addition to the usual fare in case of failure to purchase a ticket, is a reasonable regulation, which the company has the right to ²¹⁶ make: *Swan v. Manchester etc. R. R. Co.*, 132 Mass. 116; 42 Am. Rep. 432; *Du Laurans v. First Division etc. Ry. Co.*, 15 Minn. 49; 2 Am. Rep. 102; *Reese v. Pennsylvania R. R. Co.*, 131 Pa. St. 422; 17 Am. St. Rep. 818. Indeed, there can be little doubt as to the power of the railroad company to make such a discrimination between its passengers when acting under the common law, nor do we see any valid objection to a railroad company's charging an increased sum for passage where fares are collected on the train, provided that the sum collected does not exceed the statutory rate. But it is held, and we think properly, that the company cannot impose, as a penalty for not purchasing a ticket, such a sum that the fare collected on the train, including such additional amount, shall exceed the maximum allowed by law: *Railroad Co. v. Skillman*, 39 Ohio St. 444; *Chase v. New York Cent. R. R. Co.*, 26 N. Y. 523.

2. But it is contended that inasmuch as the plaintiff might have paid his fare and avoided being expelled from the car, he is entitled to recover no substantial damages. We are cited to various Michigan cases as sustaining this doctrine. But all the cases cited are cases in which the plaintiff had no ticket which, as between himself and the conductor, entitled him to ride upon the car in question, and in which there was no tender of the legal fare made. We think the case of *Hufford v. Grand Rapids etc. R. R. Co.*, 53 Mich. 121, 64 Mich. 631, 8 Am. St. Rep. 859, fully recognizes the right of the plaintiff to recover substantial damages for being evicted from the car when he either produces a ticket, or stands ready to pay the legal fare: See, also, 19 Am. & Eng. Ency. of Law, 910, and cases cited.

It is suggested that there was testimony tending to show that plaintiff gave his destination as West Bay City, which is a small fraction over thirteen miles, the distance being thirteen and five hundredths ²¹⁷ miles, and that forty cents was not in excess of the amount authorized by statute. The language of the statute is: "Such compensation for transporting any passenger . . . shall not exceed the following prices," which is fixed by subsequent provision of the section at three cents a mile, where the earnings of the road do not amount to two thousand dollars per mile. This language would apparently not permit a charge for a fraction of a mile,

unless it was so large a fraction as to make the charge of one cent or more not in excess of three cents per mile. The statute formally provided that the price of tickets might, for convenience in making change, be fixed at that multiple of five which was nearest the exact amount of fare. But the present statute (Act No. 202, Laws of 1889) contains no such provision.

The judgment will be affirmed, with costs.

McGRATH, C. J., GRANT and HOOKER, JJ., concurred.

LONG, J., did not sit.

RAILROADS—DISCRIMINATION BETWEEN FARE PAID AT STATION AND ON TRAIN.—A railway company may lawfully make and enforce a rule that passengers not procuring tickets before entering a train shall pay a greater specified rate of fare: *Toledo etc. Ry. Co. v. Wright*, 68 Ind. 556; 34 Am. Rep. 277, and note; *Hilliard v. Gould*, 34 N. H. 230; 66 Am. Dec. 765; *Jeffersonville R. R. Co. v. Rogers*, 28 Ind. 1; 92 Am. Dec. 276, and note; *Reese v. Pennsylvania R. R. Co.*, 131 Pa. St. 422; 17 Am. St. Rep. 818; *McGowen v. Morgan's Louisiana etc. S. S. Co.*, 41 La. Ann. 732; 17 Am. St. Rep. 415, and note. This question is discussed at length in the extended note to *Commonwealth v. Power*, 41 Am. Dec. 483.

RAILROADS—WRONGFUL EXPULSION FROM TRAIN—MEASURE OF DAMAGES.—Punitive damages may be awarded for the unlawful expulsion of a passenger from a train, but they should be graduated with reference to the special circumstances of each case: *Georgia R. R. etc. Co. v. Eskeu*, 86 Ga. 641; 22 Am. St. Rep. 490, and note; *Head v. Georgia Pac. Ry. Co.*, 79 Ga. 358; 11 Am. St. Rep. 434, and note. Exemplary damages may be allowed for the wrongful expulsion of a passenger from a railway car if, in such expulsion, the defendant was guilty of oppression, fraud, or violence, actual or presumed: *Gorman v. Southern Pac. Co.*, 97 Cal. 1; 33 Am. St. Rep. 157, and note with the cases collected. See, further, the extended note, to *Spellman v. Richmond etc. R. R. Co.*, 28 Am. St. Rep. 881.

GRAND RAPIDS ICE AND COAL COMPANY v. SOUTH GRAND RAPIDS ICE AND COAL COMPANY.

[102 MICHIGAN, 227.]

A GRANT OF LAND BOUNDED BY A WATERCOURSE extends the title of the grantee to the middle of the lake or stream, though it has been meandered.

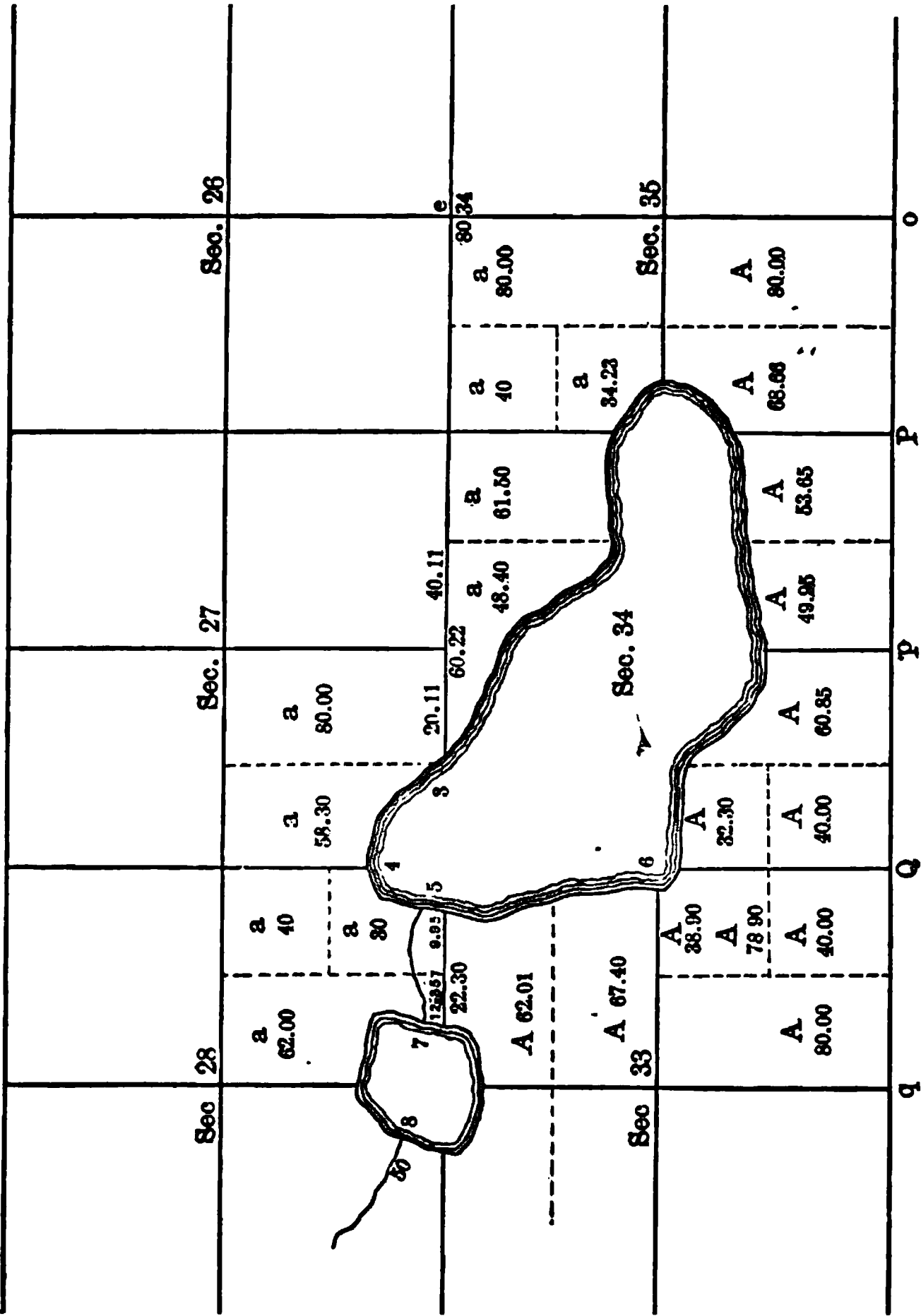
BOUNDARIES.—THOUGH A BOUNDARY IS SAID TO RUN ALONG A STREAM, or monuments are mentioned which occupy its bank, this does not limit the grant to the bank. The shore proprietor takes by virtue of shore ownership, and acquires his interest in the bed of the stream as appurtenant to the grant.

BOUNDARIES—LAKES, HOW APPORTIONED BETWEEN ADJACENT PROPRIETORS.—Where lands are granted fronting upon non-navigable waters, they should be apportioned between the different proprietors by dividing the water area in proportion to the shore frontage.

Taggart, Wolcott & Ganson, for the appellant.

J. W. Champlin, for the defendant.

228 McGRATH, C. J. This is a controversy over the right to cut ice in Reed's lake, plaintiff insisting upon ownership of the bed of the lake within the lines of the fractional sub-



divisions extended, and defendant insisting upon a division of the center line proportionate to the shore line, so as to give to each riparian owner an equitable share. The diagram on this page will best explain the situation.

By the meanders, the south shore line is 177.65 chains, and the north shore line is 117 chains. The center line of

the lake is about 488 rods. The circuit judge finds that the plaintiff's lessors took all of the upland on the north half of section 34, under a government conveyance which²²⁰ described the land taken as "the northeast fraction of section 34, . . . containing one hundred and nine acres and ninety hundredths of an acre according to the official plat of the survey of said lands returned to the general land-office by the surveyor general." It is further found:

"That what is now known and called 'Reed's lake' is a body of water lying in five different sections, and by the United States government survey was meandered, and the lands adjoining platted by the United States and sold as fractions; . . . that the lake has an outlet which extends to Grand river, and is called 'Cold brook'; that its greatest length of clear water, according to the United States plat, is 440 rods. On the east and west quarter line, if extended through the lake, it is 360 rods. If the quarter line north and south were extended through, the distance across the lake would be 192 rods. The distance across the water on the west section line of section 34 is 226 rods. The greatest width across the lake is 220 rods, and the least width is 96 rods. The waters of the lake cover over 370 acres of land. It is a pleasure resort, having four steamboats, drawing from two to four feet of water, and for carrying passengers during the summer months, and numerous smaller craft.

"The defendants are riparian owners of a piece of land situated on the south fraction of section 34, commencing at the section line between sections 33 and 34, extending eastwardly, and having a frontage on the margin of the lake of 313 feet, being a part of the southwest fractional quarter of section 34, township 7 north, of range 11 west, as described in the original purchase from the government in the same chain of title. They also had a verbal lease from the owners of the land, at the time of the cutting of the ice, lying next westerly from said section line, having a margin on the lake of 22 rods, and of the right to take ice in front thereof, so far as the same belonged to said riparian owners.

"The defendant, during the early part of the year 1893, entered upon the ice in front of the lands so leased and so owned by it, and cut and removed the ice in front of said lands, and between the shore and the middle of the lake, between lines which would be formed by running them at right angles from the center line of said lake to²²¹ the

the decisions of the supreme court of the United States, that the land described as the fraction of any subdivision—as, for instance, the southeast fractional quarter—cannot be extended beyond the lines of the said southeast quarter as they would run if extended”: Citing *Wilson v. Hoffman*, 54 Mich. 246; *Keyser v. Sutherland*, 59 Mich. 455; *Brown v. Clements*, 3 How. 665; *Palmer v. Dodd*, 64 Mich. 474.

In *Wilson v. Hoffman*, 54 Mich. 246, 117.48 acres of the south half of section 28 lay south of Black river. Plaintiff brought ejectment to recover seven acres lying on the extreme west point, and within the lines of the southwest quarter, if the lines had been extended. The description in the patent to plaintiff's grantor was:

“The southeast fractional quarter of fractional section 28, . . . containing 117 and 48-100 acres, according to the official plat of the survey of the said lands returned to the general land-office by the surveyor general.”

The map was not introduced. The court held that all subdivisional lines of a section must be straight lines running from the proper corner in one exterior line to its corresponding corner in the opposite boundary of the section, and that the patent and deed thereunder, through which plaintiff claimed, did not embrace within their description the lands in controversy, since no part thereof was within the southeast quarter of the section. The case came up again, and is reported in *Wilson v. Hoffman*, 70 Mich. 552, and the court there say:

“In granting patents for lands, it is usual for the government to add, immediately after the statement of the number of acres which the tract contains, if it be fractional, ²³² these words: ‘According to the official plat of the survey of said lands returned to the general land-office by the surveyor general.’ Such language, when used, constitutes a part of the description of the premises conveyed, and limits the purchaser to the tract as marked upon the plat of the surveyor general. This was so held in *Gazzam v. Lessee of Phillips*, 20 How. 372, which overruled the same case in 3 How. 650, under the title of *Brown v. Clements*. This was the language used in the patent to Tingley.”

The record then showed that the premises described in the declaration were embraced in what the government denominated the southeast fractional quarter of section 28.

“It might, perhaps, have been more accurate,” say the

court, "to describe it as that portion of section 28 lying south of Black river; but as the fraction contained less than 160 acres, and the law required it to be sold entire, the description contained in the patent, in connection with the official plat, was sufficient, and is quite a customary method of description in the general land-office."

In *Keyser v. Sutherland*, 59 Mich. 455, a dispute arose respecting a strip of land on the west line of section 29, in the southwest quarter of the northwest quarter of that section, which extended around the west and south sides of the southwest quarter of the section. Defendant claimed title under a conveyance from the government describing his land as the south fraction of section 29. Plaintiff's patent called for a full subdivision, to wit, the southwest quarter of the northwest quarter of section 29. *Brown v. Clements*, 3 How. 650, and *Wilson v. Hoffman*, 54 Mich. 246, are cited.

In *Palmer v. Dodd*, 64 Mich. 474, defendant was the owner in fee of the east half of the northwest fractional quarter of section 23, described in the United States patent as containing 57 acres. Plaintiff was the owner in fee of the southwest fractional quarter of section 23. The section was made fractional by a lake and marsh, which was meandered by the United States survey. The trespass was committed ²³⁴ within the boundaries of the southwest quarter, if the quarter lines should be extended. The lake, which was surrounded by the marsh, was mostly located upon the southeast quarter of the southwest quarter of the section. Defendant claimed to own to the center of the lake. The court say:

"But no grantee by such patent, granting a legal subdivision of land, can derive title to land upon another legal subdivision. This we have decided in the cases of *Wilson v. Hoffman*, 54 Mich. 246, and *Keyser v. Sutherland*, 59 Mich. 455, which were based upon the decision of the supreme court of the United States in *Brown v. Clements*, 3 How. 650. The principles which govern the rights of riparian proprietors do not apply to defendant's grant. No part of the land granted to him in the description contained in his patent was bounded by a lake or other water. His grant extended no farther south than the east and west quarter line of the section, and this line did not touch or intersect the shore of any lake. Indeed, the lake is nearly 40 rods south of this line."

In the *Palmer* case the court recognized the principles which govern the rights of riparian owners, but held that

they did not apply. The question before the court in the other cases was the significance of meander lines. In none of them did the question arise as to the rights of shore owners as between themselves.

It was held in *Clute v. Fisher*, 65 Mich. 48, that the rule that private ownership of lands bounded on navigable fresh water is not restricted to the meander line must also apply to the small inland lakes by analogy, whether they can strictly be termed "navigable" or not; and it was also conceded that in case of a body of water so large that the lines of the sections or subdivisions of sections held by the shore owners, if extended, do not embrace the whole of said lake, then the rule of riparian ownership may be extended to the center line of said lake. It would seem to follow that the extent of the qualified ownership in the bed of the river or lake must depend upon the shore ownership, ²²⁵ rather than upon the distance from the shore to the parallel subdivision line. The rule laid down in that case, that the owner of a fractional subdivision owns the soil which is included within the extended subdivision lines, is inconsistent with the rule, repeatedly laid down in this state, that the shore proprietor owns to the thread or center of the stream. It is also inconsistent with the rule laid down in *Clark v. Campau*, 19 Mich. 328, and *Bay City Gas-Light Co. v. Industrial Works*, 28 Mich. 182, that side lines are to be governed by the course of the stream, and the submerged land bounded by lines drawn at right angles with the central thread, rather than at right angles with the shore at the point of departure. The application of the rule of the *Clute* case to the one before us would leave the west half of the northwest quarter of section 34 without the lines of any subdivision, and would apportion that area upon the basis of imaginary subdivision lines, without reference to shore proprietorship. Again, the rule that a conveyance of a fractional subdivision actually conveys the entire subdivision is inconsistent with the rule laid down in *Au Gres Boom Co. v. Whitney*, 26 Mich. 42; *Dart v. Barbour*, 32 Mich. 271; *Jones v. Pashby*, 62 Mich. 614; *Hartford Iron Min. Co. v. Cambria Min. Co.*, 80 Mich. 491. In each of these cases part of a parcel of land having a water frontage was conveyed, describing it as half of the lot or parcel, and it was insisted that the conveyance was of half of the water frontage; but the court held that the words "half of the lot" meant half in quantity of the upland. A correct

result was reached in the Clute case, but the reasons given are without support. That case and those upon which it relies were based upon *Brown v. Clements*, 3 How. 665, which was expressly overruled in *Gazzam v. Lessee of Phillips*, 20 How. 372. See, also, *Hardin v. Jordan*, 140 U. S. 871. In any event, we think ²³⁶ that this case is governed by the rule laid down in *Jones v. Lee*, 77 Mich. 35.

Unless the contrary appear, a grant of land bounded by a watercourse conveys riparian rights: *Richardson v. Prentiss*, 48 Mich. 88; and the title of the riparian owner extends to the middle line of the lake or stream of the inland waters: *Webber v. Pere Marquette Boom Co.*, 62 Mich. 626, and cases cited at page 636. A boundary line may be so described as to preclude the extension of the grant by construction to the center of the stream. When it is said that meanders have no significance as boundaries, what is meant is that meanders do not preclude such extension of the grant.

In *Luce v. Carley*, 24 Wend. 451, 35 Am. Dec. 637, among the courses in the description of the premises were those to a hemlock stake "standing on the east bank of the river; from thence down the river, as it winds and turns, 24 chains and 94 links, to a hard maple tree." The court say:

"It is never thought that monuments mentioned in such a deed as occupying the bank of the river are meant by the parties to stand on the precise water line. . . . They are used rather to fix the termini of the line which is described as following the sinuosities of the stream. . . . Where the grant is so framed as to touch the water of the river, and the parties do not expressly except the river, . . . one-half the bed of the stream is included by construction of law": *Child v. Starr*, 4 Hill, 375; *Seneca Nation v. Knight*, 23 N. Y. 498; *Rix v. Johnson*, 5 N. H. 520; 22 Am. Dec. 472; *Gouverneur v. National Ice Co.*, 134 N. Y. 355; 30 Am. St. Rep. 669.

The shore proprietor takes by virtue of shore ownership. His interest in the bed of the stream he acquires as appurtenant to the grant, and the extent of that interest depends upon his frontage, and the form, length, and breadth of the body of water upon which he abuts. That a lake may be of such form as to render the designation in it of the boundaries of the several riparian owners ²³⁷ somewhat difficult is not an objection to the application of the rule. Mr. Justice Campbell says in *Lincoln v. Davis*, 53 Mich. 390, 51 Am. Rep. 116:

"In carrying out lines of ownership in narrow streams it

is easy to find the general course of the stream, and to draw lines perpendicular to that course from the terminal shore lines. But on lakes all lines from the shore tend to converge in some central part of the lake; and, while irregularity of shape prevents drawing them to a common center, they must all, if protracted, cross each other in a perplexing way. The rule adopted in such waters, where the whole surface could be appropriated, has always been to divide the water area in proportion to the shore frontage, and never to attempt any division by lines run from the shore, except over such parts of the lake as are substantially adjacent to the shore. In some cases, by a fair partition, a shore owner would, by his extent of shore line, obtain a share beyond the center. But it seems impossible, if the whole water is to be regarded as divided up, to reach a division without some proceeding in the nature of a partition which will fix the various possessions."

Again, in *Jones v. Lee*, 77 Mich. 35, Mr. Justice Campbell says: "It appears clearly enough in the present case that while there is a considerable frontage facing northwest or southeast, the lake being longest in that direction, there must also be large end frontages, which look up or down the lake perpendicularly, or nearly so, to any line across from bank to bank, at most places along the shores. If this body of water were not navigable, and if all its waters could in any way be apportioned among the riparian proprietors for any lawful purpose, it is evident that it could not be done by reference to any *filum aquæ* or middle thread, but must be done by some rule of proportion, which properly could only be got at by some partition proceeding, inasmuch as such waters are common for all ordinary uses."

In *Blodgett etc. Lumber Co. v. Peters*, 87 Mich. 498, 24 Am. St. Rep. 175, the question arose as to the proper apportionment between several shore owners in a cove on Green bay.

²³⁸ In *Hardin v. Jordan*, 140 U. S. 402, the court say: "If there should arise any question between the plaintiff and other riparian owners of lands situated on the margin of the lake as to the convergence of the side lines of the plaintiff's land in the lake, it can be disposed of by the parties themselves, by a resort to equity or to such other form of procedure as may be proper: See, also, *Gouverneur v. National Ice Co.*, 134 N. Y. 355; 30 Am. St. Rep. 669.

In the present case it is practically conceded by plaintiff

that, unless the rule contended for by it is applicable, the judgment below was correct.

The judgment is therefore affirmed.

The other justices concurred.

BOUNDARIES ON WATERS—HOW FAR GRANTEES TAKE.—A grant of and bordering upon a river carries the exclusive right and title in the river to the center thereof, subject to the right of passage in the public, unless the terms of the grant specially indicate an intention on the part of the grantor to confine the grantee to the edge: *Chicago v. Van Ingen*, 152 Ill. 624; 43 Am. St. Rep. 285. A grant by the state to a riparian proprietor running with a navigable stream extends only to low-water mark: *State v. Mason*, 114 N. C. 787; 41 Am. St. Rep. 811. See a full discussion of this subject in the extended note to *Allen v. Weber*, 27 Am. St. Rep. 56.

BOUNDARIES ON WATERCOURSES, WHETHER LIMITED BY MONUMENTS at the side of the stream, is discussed in the extended note to *Allen v. Weber*, 27 Am. St. Rep. 59.

RIPARIAN RIGHTS OF GRANTEES OF LAND BORDERING ON LAKES.—By the common law the same rules as to riparian rights which apply to streams apply also to lakes or other bodies of still water. Hence, if a meandered lake is non-navigable in fact, the patentee of land bordering thereon takes to the middle of the lake, while if the lake is navigable in fact its waters and bed belong to the state: *Lamprey v. State*, 52 Minn. 181; 38 Am. St. Rep. 541, and note. See, also, the extended note to *Miller v. Mendenhall*, 19 Am. St. Rep. 230.

HURST v. WARNER.

[102 MICHIGAN, 238.]

LEGISLATIVE POWER—DELEGATION OF.—A state board of health may, by the legislature, be authorized to establish a quarantine system for the purpose of preventing immigrants and other persons from entering the state and going from place to place within it who, in the opinion of the board, or an inspector appointed by it, are likely to carry infectious diseases, and generally to establish quarantine regulations and rules and detain and disinfect baggage and other property.

CONSTITUTIONAL LAW—QUARANTINE REGULATIONS.—It is within the power of the legislature to make it unlawful for any person to refuse to permit his baggage and personal effects to be disinfected in accordance with rules and regulations formulated by the state board of health.

QUARANTINE LEGISLATION—STATE BOARD OF HEALTH, UNAUTHORIZED RULES AND REGULATIONS OF.—Though a state board of health is authorized to establish general rules, and, by an inspector acting by its authority, to detain railway cars and other public or private conveyances whenever it appears that such cars or other conveyances contain any passenger or personal property which has been exposed to any dangerous, communicable disease, it is not authorized to subject the baggage of all immigrants to disinfection, whether such immigrants come from a locality where any dangerous, communicable disease exists or not.

A. A. Ellis, attorney general, for the relator.

E. C. Chapin and John D. Conely, for the respondent.

239 MONTGOMERY, J. The relator, who is prosecuting attorney **240** for the county of Chippewa, on the 24th of November, 1893, presented to the respondent, who is a justice of the peace of said county, a complaint alleging that one Robert B. Finch was a station agent of the Minneapolis, St. Paul & Sault Ste. Marie Railway Company at Sault Ste. Marie, and on the 23d of November, 1893, was in charge of a train belonging to said railway company; that on said train there was baggage, consisting of clothing, wearing apparel, etc., belonging to one Edmund Watelet, an immigrant, late of Havre, France, who was traveling through Michigan to Minneapolis, and whose baggage was liable to be disinfected by one Thomas N. Rogers, an inspector authorized by the Michigan state board of health to disinfect the baggage of all immigrants destined to pass into or through the state of Michigan; that said Finch was requested by said Rogers to detain said baggage for inspection and disinfection, and willfully refused so to do, and proceeded with said train and said baggage into and through Michigan, in violation of rule No. 2 framed and published by the Michigan state board of health, under Act No. 230, Laws of 1885, as amended by Act No. 47, Laws of 1893, of this state. Upon the presentation of this complaint the respondent was requested by the relator to cause a warrant to be issued, based upon said complaint, but he declined to do so, for the reason that Act No. 47, Laws of 1893, was unconstitutional and void, and for the further reason that, if said act was not void, rule No. 2, upon which the prosecution was based, was not authorized by said act, and that the board of health exceeded its authority in passing said rule. The relator then applied to the circuit court for a mandamus, which was refused, and a writ of certiorari has been issued to review the decision of the circuit judge. The two questions presented here are those which determined the action of the justice.

241 1. It is contended, and the circuit judge held, that the statute in question is unconstitutional, for the reason that it delegates to the state board of health legislative power, in contravention of section 1 of article 4 of the constitution, which provides that the "legislative power is vested in a senate and house of representatives." To determine the question

involved, it is necessary to refer at some length to the provisions of the statute. Section 1 provides that: "Whenever it shall be shown to the satisfaction of the state board of health that cholera, diphtheria, or other dangerous, communicable disease exists in any foreign country, neighboring state, or locality within this state, whereby the public health is imperiled, and it shall be further shown that immigrants, passengers, or other persons seeking to enter this state, or to travel from place to place within this state, are coming from any locality where such dangerous, communicable disease exists, and are likely to carry infection of such dangerous, communicable disease, the state board of health shall be authorized to establish a system of quarantine for the state of Michigan, or for any portion thereof."

Section 2 provides that: "Such quarantine shall be for the purpose of preventing all immigrants, passengers, or other persons, under the circumstances mentioned in section one of this act, from entering the state, or from going from place to place within the state, who, in the opinion of the state board of health, or in the opinion of an inspector duly appointed by said board, are likely to carry infection of cholera, smallpox, diphtheria, or other dangerous, communicable disease; and for the detention of all such persons outside the borders of the state, or, if already within the state, at the places where they may be, or at the place they have been exposed to or have contracted such dangerous, communicable disease, or at such suitable place as such board may provide, during the period of the incubation of such disease, or of its existence if already developed, and until, in the opinion of the state board of health, such persons are free from all danger of infection."

242 Section 3 provides that: "The state board of health is authorized to establish general rules, and, by an inspector acting by virtue thereof, to detain railroad cars or other public or private conveyances whenever it shall be shown to the satisfaction of such board, or to the inspector, as provided in such rules, that such cars or other conveyances contain any passenger, person, or property which has been exposed to cholera, diphtheria, or other dangerous, communicable disease, or when it shall be shown to the satisfaction of such board or inspector as aforesaid that any passenger, person, or property is being transported on such railroad cars, or other public or private conveyance, from any locality within or without this state where any such dangerous, communicable disease ex-

ists, and where, under the circumstances shown to such board, such persons or property are likely to carry infection of such dangerous, communicable disease. In such case said board may, by its duly constituted inspectors, remove, isolate, place under the care of local boards of health, order to be returned to the places whence they came, or dispose of in any other manner it may consider proper, all railroad cars, or other conveyances, all passengers in such railroad cars or other conveyances, when there is reason, as aforesaid, to believe such may have contracted or become infected with any dangerous communicable disease, or have been exposed or infected by any such disease in a manner likely to render them bearers of infection."

Section 4 provides: "All such persons, their baggage, and other personal effects, and all such conveyances, shall be disinfected under such rules and regulations as the state board of health may establish for the purpose of carrying into effect the provisions of this act, before such persons or baggage or conveyances shall be permitted to enter the state, or to proceed to their or its destination if already in the state."

Section 5 provides for the disinfection of goods, merchandise, conveyance, or other property which the state board has reason to believe may carry the germs of cholera or other dangerous, communicable disease, and authorizes the board, under the circumstances mentioned, ²⁴³ in sections 2 and 3 of the act, to prohibit the entry of such goods, merchandise, or other property into the state, or their being moved, if within the state, until such disinfection shall be accomplished. Section 6 provides: "It shall be the duty of the state board of health to frame and publish rules for the inspection, isolation, detention, and disinfection contemplated in this act. Whoever shall willfully violate the rules of the state board of health, made in pursuance of this act, or the order by its duly appointed inspector made in obedience to such rules, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be liable to payment of a fine of \$100 and costs of prosecution, or imprisonment in the county jail for a period not to exceed 90 days," etc.

As was said by Chief Justice Marshall in *Wayman v. Southard*, 10 Wheat. 1: "It will not be contended that congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative. But congress may certainly delegate to others powers which the legislature may

rightfully exercise itself. . . . The difference between the departments undoubtedly is that the legislature makes, the executive executes, and the judiciary construes, the law. But the maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry."

In *In re Griner*, 16 Wis. 423, 433, Mr. Justice Cole, speaking for the court, and referring to the rule that the powers of the different departments are not to be confounded, or delegated by the one department to the other, said: "Most of the propositions stated are recognized political maxims under our form of government. It is only the conclusion or deduction from those propositions about which any doubt can exist. No one will seriously contend that congress can delegate legislative power to the president. But a distinction must be made of 'those important subjects which must be entirely regulated by the ²⁴⁴ legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provision to fill up the detail.' It would seem that the power given to the president to make all rules and regulations to carry into effect the law for calling out the militia is of the latter character. Congress might have regulated by its legislation the whole details of the draft, if it had thought proper to do so. But, having in the most ample manner clothed the president with power to call forth the militia, it further provided that he should make all proper rules and regulations for the enforcement of the draft, where state laws upon the subject were defective. . . . This no more partakes of legislative power than that discretionary authority intrusted to every department of the government in a variety of cases. This practice of giving discretionary power to other departments or agencies, who were intrusted with the duty of carrying into effect some general provisions of law, had its origin at the adoption of the constitution, and in the action of the first congress under it, as the federal legislation abundantly shows": See, also, as bearing upon this question, *Field v. Clark*, 143 U. S. 649; *Locke's Appeal*, 72 Pa. St. 491; 13 Am. Rep. 716; *Georgia R. R. Co. v. Smith*, 70 Ga. 694.

In the present case we think it can hardly be doubted, under the authorities cited, that the legislature might have provided for the disinfection of the baggage and personal effects of travelers coming from infected ports, under the

direction of an inspector of the board. To have made such a law effective, it would have been essential that the inspector should be given authority to act, and to make it a misdemeanor to refuse to recognize his authority. The present act does nothing more, except that it provides that such disinfection shall take place under general rules to be adopted by the state board of health. The rules relate to matter of detail. It is well known that there are different methods of disinfection. It was properly left to the board by the legislature to determine as to these methods; and, instead of intrusting ²⁴⁵ it to the discretion of the individual inspector, it was prescribed that general rules should be adopted.

We are referred to the case of *Senate of Happy Home Clubs v. Board of Supervisors*, 99 Mich. 117, as authority for respondent's contention. The statute considered in that case bears no analogy to the statute under consideration. The power was there delegated to a private corporation to make rules governing the conduct of the accused, the observance of which rules should operate to acquit and discharge the accused. This did not leave a discretion in public officials as to the mere details of the operation of the law, but was an attempt to delegate power to a private corporation, which it was clearly beyond the authority of the legislature to do.

Reliance seems to have been placed by the circuit judge upon the two cases of *Ex parte Cox*, 63 Cal. 21, and *Board of Harbor Commrs. v. Excelsior Redwood Co.*, 88 Cal. 491, 22 Am. St. Rep. 321. In the latter case an attempt was made to confer upon the board of harbor commissioners the power to prescribe rules, and fix the penalty for their violation, which clearly distinguishes it from the present. In the case of *Ex parte Cox*, 63 Cal. 21, the petitioner was convicted of a misdemeanor, consisting of the violation of a rule and regulation of the board of state viticultural commissioners. The act of the legislature in question declared that the board should have power to declare and enforce rules and regulations, in the nature of quarantine, to govern the manner of and restrain or prohibit the importation into the state of infected articles and empty fruit boxes, and declared that a willful violation of the quarantine regulations of the board should be a misdemeanor. The court say: "The act before us does not say it shall be unlawful to import, distribute, or

dispose of infected articles, but it attempts to confer upon the board the power to so declare."

²⁴⁶ We think our statute is distinguishable in principle from the one here dealt with. The effect of the provisions of our statute is to declare it unlawful for any person to refuse to permit his baggage and personal effects to be disinfected in accordance with the rules and regulations of the state board of health. The rules and regulations are limited to the purposes which are specifically described by the act. We think the statute is constitutional.

2. As above stated, by the act of 1893 it was not intended to confer upon the board any power beyond that of fixing the method to be adopted in carrying into effect the details of the isolation, inspection, disinfection, etc., provided for by the law itself. By the first section the board is authorized to establish a quarantine when it is shown to the satisfaction of the board that dangerous, communicable disease exists in any foreign country, neighboring state, or locality within this state, and when it is further shown that immigrants, passengers, or other persons seeking to enter this state, or to travel from place to place within this state, are coming from any locality where such dangerous, communicable disease exists. By section 3 it is provided that "the state board of health is authorized to establish general rules, and, by an inspector acting by virtue thereof, to detain railroad cars, or other public or private conveyances, whenever it shall be shown to the satisfaction of such board, or to the inspector as provided in such rules, that such cars or other conveyances contain any passenger, person, or property which has been exposed to cholera, diphtheria, or other dangerous, communicable disease, or when it shall be shown to the satisfaction of such board or inspector as aforesaid that any passenger, person, or property is being transported on such railroad cars or other public or private conveyance from any locality within or without this state where any such dangerous, communicable disease exists, and where, under the circumstances shown to such board, such persons or property are ²⁴⁷ likely to carry infection of such dangerous, communicable disease."

A careful examination of the rules declared by the board, and particularly of the one alleged to have been violated, leads us to the conclusion that the board exceeded the authority conferred by the statute by the promulgation of the

rule in question. The rules recite the existence of communicable diseases in various foreign countries from which immigrants are coming to the United States in large numbers, and then proceed, by rule 2: "Except as hereinafter specifically excepted, all baggage of all immigrants, and all containers of all such baggage, destined to pass into or through Michigan, must be detained until disinfected."

The exceptions mentioned are: "1. Baggage bearing a certificate issued by an inspector authorized or accredited by the Michigan state board of health; 2. Baggage contained in sealed cars, such seals not to be broken or the cars opened in the state of Michigan; 3. Hand baggage of immigrants used en route, and known to have crossed the ocean in ships uninfected with any dangerous, communicable disease, or bearing a certificate of disinfection, issued by an inspector authorized or accredited by the Michigan state board of health."

Under these rules the baggage of all immigrants was subject to disinfection, whether such immigrant came from a port or locality where any dangerous, communicable disease existed or not. Indeed, there was no allegation in the complaint that the baggage in question came from such locality. This is beyond the power of the board.

We do not intimate that it would not be competent for the legislature to provide for the disinfection of all baggage, where, in the opinion of the state board of health, from the prevalence of a contagious disease, such precaution is necessary. But, instead of doing so, it is provided by section 3 that the board is authorized to establish general ²⁴⁸ rules, and, by an inspector acting by virtue thereof, to detain railroad cars or other public or private conveyances whenever it shall be shown to the satisfaction of such board, or to the inspector, as provided in such rules, that such cars or other conveyances contain any passenger, person, or property which has been exposed, etc., or when it shall be shown to the satisfaction of such board or inspector as aforesaid that such passenger, person, or property is being transported from any locality where any such dangerous, communicable disease exists, and where such persons or property are likely to carry infection of such dangerous, communicable disease. The rule in question did not make it a prerequisite to the inspection that the baggage being transported come from a locality where such disease existed, as ascertained either by the board

or inspector, and in this respect was broader than the statute, and cannot be sustained.

It follows that the justice was right in refusing to issue the warrant. We have, however, gone at length into the consideration of the provisions of the statute to show to what extent authority is conferred upon the board, as the question involved is one of great public importance.

The judgment will be affirmed.

The other justices concurred.

Quarantine and Health Laws and Regulations.

Perhaps no legislation, municipal, state, or national, is of greater importance than that directed to the exclusion, so far as practicable, of contagious diseases by which the health and life of men or of animals may be affected, and the keeping of those diseases, when they have once gained an entrance, within the smallest possible limits, and providing for the establishment and enforcement of regulations by which their general dissemination shall be prevented and their continued existence rendered improbable or impossible. Nor is it possible to enforce these regulations in any locality for any great length of time without affecting commerce with other localities and producing conflicts of interest, not only between citizens of these different localities, but often between citizens of the same municipality. It is doubtless true that regulations of this character may, to a certain extent, be enacted and enforced by municipal, by state, and by national authority, and it is, we think, difficult, if not impossible, to now formulate any test by which to determine between these separate authorities whether a regulation of the one must be disregarded because infringing upon the authority of the other, beyond the general suggestion that a municipal ordinance cannot prevail over a state law, and a state law must not, under the guise of a quarantine regulation, assume to regulate commerce between the states or with foreign nations nor to "lay any duty on tonnage."

National Laws and Regulations.—One of the powers conferred upon the Congress of the United States is that of regulating commerce "with foreign nations, and among the several states, and with the Indian tribes": Const., art. 1, sec. 8. It follows from this grant of power that, at least in so far as they may be deemed regulations of foreign or interstate commerce, congress has the power to enact laws upon the subject of quarantine, and that such laws must prevail as against any conflicting state or local legislation, and, from the fact that the states have reserved to themselves the powers not conceded to the national legislature by the constitution of the United States, each state may enact and enforce quarantine or other regulations for the preservation of the public health not infringing upon the authority of congress to regulate commerce: Story on the Constitution, secs. 1070-1075.

So far as we are aware, no case has yet been presented for judicial determination involving the claim that some law or regulation authorized by the United States with a view of protecting and preserving the public health and preventing the introduction or spread of disease, either among men or beasts, was in conflict with some state law or regulation, and was an attempt by the national legislature to go beyond its mere power to regulate commerce, and hence to assume jurisdiction of matters strictly within that control. Congress, it is true, has, almost from the beginning, avoided any

conflict between state and national authority by, in effect, adopting the state laws and regulations, and directing the officers and agents of the general government to aid in their enforcement: Story on the Constitution, sec. 1075; *Gibbons v. Ogden*, 9 Wheat. 205; *Lockwood v. Bartlett*, 130 N. Y. 340. Thus section 4792 of the Revised Statutes of the United States declares that "the quarantines and other restraints established by the health laws of any state, respecting any vessels arriving in or bound to any port or district thereof, shall be duly observed by the officers of the customs revenue of the United States, by the masters and crews of the several revenue cutters, and by the military officers commanding in any fort or station upon the sea coast; and all such officers of the United States shall faithfully aid in the execution of such quarantines and health laws, according to their respective powers and within their respective precincts, and as they shall be directed, from time to time, by the secretary of the treasury. But nothing in this title shall enable any state to collect a duty of tonnage or impost without the consent of congress."

The succeeding section enacts that whenever, by the health laws of any state or by the regulations made pursuant thereto, any vessel arriving within a collection district of such state is prohibited from coming to the port of entry or delivery by law established for such district, and such health laws require or permit the cargo of the vessel to be unladen at some other place within or near to such district, the collector, after due report to him of the whole of such cargo, may grant his warrant or permit for the unloading or discharge thereof under the care of the surveyor or one or more inspectors at some other place where such health laws permit, and upon the conditions and restrictions which shall be directed by the secretary of the treasury, or which such collector may for the time deem expedient for the security of the public revenue.

By the statute of April 29, 1878, it was declared: "That no vessel or vehicle coming from any foreign port or country where any contagious or infectious disease may exist, and no vessel or vehicle containing any person or persons, merchandise, or animals affected with any infectious or contagious disease, shall enter any port of the United States or pass the boundary line between the United States and any foreign country contrary to the quarantine laws of any one of said United States in or through the jurisdiction of which such vessel or vehicle may pass or to which it is destined, and except in the manner and subject to the regulations to be prescribed as hereinafter provided." This statute further provided that whenever an infectious or contagious disease shall appear in any foreign port or country, and whenever any vessel shall leave any infected foreign port, or have on board goods or passengers coming from any port or district infected with cholera or yellow fever bound for any port in the United States, the consular officer or other representative of the United States at or nearest such foreign port shall give notice thereof to the supervising surgeon general of the marine hospital service and to the health officer of the port of destination in the United States, and that the surgeon general shall, under the direction of the secretary of the treasury, be charged with the execution of the provisions of the act, and shall frame all needful rules and regulations for that purpose, subject to the approval of the president, but that such rules or regulations shall not conflict with or impair any sanitary or quarantine laws or regulations of any state or municipal authority now existing or which may hereafter be enacted; and that at all ports where, in the opinion of the secretary of the treasury, it

shall be necessary to establish quarantine, the medical officers or other agents of the marine hospital service shall perform such duties in the enforcement of the quarantine laws and regulations as may be assigned by the surgeon-general of that service, provided that there shall be no interference in any manner with any quarantine laws or regulations as they may now exist or may hereafter be adopted by state laws."

Other statutes were enacted by congress establishing a national board of health and relating to contagious diseases, but their operation was restricted to four years from and after their passage: See 20 U. S. Stats. 484; 21 U. S. Stats. 5, 46. By chapter 453 of the statutes of 1882 the duties of the board of health were restricted to the diseases of cholera, smallpox, and yellow fever: 22 U. S. Stats. 315.

By the act of August 30, 1890, the importation of cattle, sheep, or other ruminants and swine which had been exposed to any disease was prohibited, and the secretary of agriculture was authorized to place and retain in quarantine all such ruminants and swine at such ports as he might designate, and upon such conditions as he might, by regulation, prescribe, and the importation of any such animals into the United States at any other port was forbidden; and the president, whenever in his opinion it should be necessary for the protection of animals in the United States against infectious or contagious diseases, was authorized by proclamation to suspend the importation of all or any class of animals for a limited time, during which the importation of such animals should be unlawful: 26 U. S. Stats. 416.

On February 15, 1893, was enacted another statute, granting additional quarantine powers, and imposing additional duties upon the marine hospital service, making it unlawful for any vessel from any foreign port to enter any port of the United States, except in accordance with the regulations prescribed by the act, among which was that the vessel should be required to obtain from an officer of the United States at the port of its departure a bill of health in the form prescribed by the secretary of the treasury. The supervising surgeon general of the marine hospital service was also authorized to examine the quarantine regulations of all state and municipal boards of health, and, under the direction of the secretary of the treasury, to co-operate with and aid state and municipal boards of health in the execution and enforcement of the rules and regulations of such boards, and of the rules and regulations made by the secretary of the treasury to prevent the introduction of contagious or infectious diseases into the United States from foreign countries, or into one state or territory or the District of Columbia from another state or territory or the District of Columbia; and when, in the opinion of the secretary of the treasury, the quarantine regulations of the state or territory or municipality were not sufficient to prevent the introduction of such diseases into the United States or the state or territory or district, the secretary of the treasury was authorized to make additional rules and regulations to prevent such introduction; that when such rules and regulations had been made and promulgated by the secretary of the treasury, if the state or municipal authorities should refuse or fail to regulate them, the president should execute and enforce the same, and adopt such measures as, in his judgment, should prevent the introduction and spread of such diseases, and should detail officers for that purpose. The president was further given authority, if he should deem it necessary to prevent the introduction of cholera, or other infectious or contagious diseases, from a foreign country, to wholly prohibit the introduction of persons

and property from such countries and places as he shall designate, and for such period of time as he shall deem necessary: 27 U. S. Stats. 449-452.

It will be seen from examining this last statute that under its provisions a conflict may arise between the state and national authorities, because it vests the secretary of the treasury with power to make rules and regulations in addition to those prescribed by the state, and, in the event of their nonenforcement by the state officers, the president may execute and enforce the same, and adopt such measures as to him may seem necessary and detail officers for that purpose. Under this authorization, the president may formulate and provide for the enforcement of regulations for the purpose of preventing the introduction of a contagious disease into one state from another, and, while such regulations may, in the greater number of cases, savor of regulations of commerce, and therefore be such that the state must yield to them, it is easy to suggest rules upon the subject which cannot fairly be deemed rules for the regulation of commerce, and which, it would seem, the national government has no rightful authority to enforce within the state when in conflict with its laws.

State Laws.—Each state has unquestionable authority, in the protection of the life, health, and property of its citizens, to adopt and enforce rules and regulations designed for the preservation and promotion of the health and the prolongation of the lives of its citizens, and also of all other forms of life, whether animal or vegetable, except in so far as some limitation upon this power, either express or implied, can be found in the constitution of the United States, or the laws enacted in pursuance thereof. It has not, so far as we can ascertain, been suggested that any such limitation can be found, unless it is contained in the grant to congress of the power to regulate commerce with foreign nations, among the several states, or with the Indian tribes. It has been contended that, in the exercise of this power, congress may so completely cover the subject of health and quarantine regulations as to leave the states no opportunity for further action, and therefore that the national authority may entirely exclude the state authority. Whether this is true or not, we shall probably never know, for the reason that congress, instead of prohibiting state action, has stimulated and adopted it, and has for itself disclaimed all wish to act, except when the state regulation and action prove inadequate. The authority of the state is, nevertheless, to some extent limited by the national constitution. Its action is not necessarily invalid because it may affect commerce with foreign nations or among the states. It must not, however, unnecessarily interfere with such commerce, and it cannot, under pretense of adopting quarantine regulations or health laws, regulate or prohibit commerce in a way, or to an extent, not required for the preservation or promotion of the public health.

“Quarantine laws are a familiar exercise of the police power of a state. Their enactment is within its lawful province, and the making of regulations for their enforcement has always been intrusted to subordinate boards. Even if it be conceded, as it has often been contended, that whenever congress shall undertake to provide a general system of quarantine or shall confide the execution of such a system to a national board of health, or to local boards of health, as may be found expedient, all state laws will be abrogated, at least so far as the two are inconsistent; until this is done, the laws of the state are valid”: *Train v. Boston Disinfecting Co.*, 144 Mass. 523; 59 Am. Rep. 113.

It follows from these views, which are supported by many other adjudications, both state and national, that the quarantine regulations of a state

must be sustained when they may fairly be deemed to fall within its police power, and, furthermore, that the cases, when they can be adjudged not to fall within it, must be of an extreme character and of rare occurrence. This is a very general and comprehensive power, including within it the adoption and enforcement of such laws as may fairly be deemed to have been designed in good faith for the promotion of the public welfare, and which are not in direct conflict with some constitutional limitation: *New York v. Miln*, 11 Pet. 132. While the national government has reserved to itself the right to regulate commerce, it does not follow that every state law which to some extent affects or regulates commerce must be disregarded as in conflict with the paramount national authority. The regulation may be with reference to a subject matter concerning which the national authority has not deemed it proper to act, in which case, though the state action may properly be designated as a regulation of commerce, yet it will be allowed to stand because not in conflict with any national regulation. Thus, in the leading case upon this topic, the quarantine laws of the state of Louisiana were assailed because they required all vessels passing designated stations to submit to an examination by state officials, and to pay a fee therefor, and it was insisted that this was necessarily a regulation of commerce and an imposition of tonnage duties. The supreme court of the United States, in deciding the cause, commented upon the quarantine laws of the state and affirmed their propriety and necessity, and that the fee complained of "is not a tonnage tax within the true meaning of that word as used in the constitution, but is a compensation for services rendered as part of the quarantine system of all countries to the vessel which receives the certificate that declares it free from further regulations." As to the supposed invalidity of the law because it operated as a regulation of commerce, the court said: "Is the law under consideration void as a regulation of commerce? Undoubtedly it is in some sense a regulation of commerce. It arrests a vessel on a voyage which may have been a long one. It may affect commerce among the states when the vessel is coming from some other state of the union than Louisiana, and it may affect commerce with foreign nations when the vessel arrested comes from a foreign port. This interruption of the voyage may be for days or for weeks. It extends to the vessel, the cargo, the officers and seamen, and the passengers. In so far as it provides a rule by which this power is exercised, it cannot be denied that it regulates commerce. We do not think it necessary to enter into the inquiry whether, notwithstanding this, it is to be classed among those police powers which were retained by the states as exclusively their own, and, therefore, not ceded to congress. For while it may be a police power in the sense that all provisions for the health, comfort, and security of the citizens are police regulations, and an exercise of the police power, it has been said more than once in this court that, even where such powers are so exercised as to come within the domain of federal authority as defined by the constitution, the latter must prevail: *Gibbons v. Ogden*, 9 Wheat. 1; 210; *Henderson v. Mayor*, 92 U. S. 259, 272; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 661. But it may be conceded that whenever congress shall undertake to provide for the commercial cities of the United States a general system of quarantine, or shall confide the execution of the details of such a system to a national board of health, or to local boards, as may be found expedient, all state laws on the subject will be abrogated, at least so far as the two are inconsistent. But, until this is done, the laws of the state on the subject are valid. This follows from two reasons: 1. The

act of 1799, the main features of which are embodied in title 58 of the Revised Statutes, clearly recognizes the quarantine laws of the states, and requires of the officers of the treasury a conformity to their provisions in dealing with vessels affected by the quarantine system. And this very clearly has relation to laws created after the passage of that statute, as well as to those then in existence; and when, by the act of April 29, 1878 (20 U. S. Stats. 37), certain powers in this direction were conferred on the surgeon general in the marine hospital, and consuls and revenue officers were required to contribute services in preventing the importation of disease, it was provided that 'there shall be no interference in any manner with any quarantine laws or regulations as they now exist or may hereafter be adopted under state laws,' showing very clearly the intention of congress to adopt these laws, or to recognize the powers of the states to pass them. 2. But, aside from this, quarantine laws belong to that class of state legislation which, whether passed with intent to regulate commerce or not, must be admitted to have that effect, and which are valid until displaced or contravened by some legislation of congress. The matter is one in which the rules that should govern it may in many respects be different in different localities, and for that reason be better understood and more wisely established by the local authorities. The practice which would control a quarantine station on the Mississippi river, a hundred miles from the sea, may be widely and wisely different from that which is best for the harbor of New York. In this respect the case falls within the principle which governed the cases of *Willson v. Blackbird Creek Marsh Co.*, 2 Pet. 245; *Cooley v. Board of Wardens*, 12 How. 299; *Gilman v. Philadelphia*, 3 Wall. 713, 727; *Pound v. Turk*, 95 U. S. 459, 462; *Hall v. De Cuir*, 95 U. S. 485, 488; *Pucket Co. v. Catlettsburg*, 105 U. S. 559, 562; *Transportation Co. v. Parkersburg*, 107 U. S. 691, 702; *Kacanaba Co. v. Chicago*, 107 U. S. 678"; *Morgan Steam Ship Co. v. Louisiana Board of Health*, 118 U. S. 455; *Passenger Cases*, 7 How. 283. Therefore, it must be conceded that a state quarantine law will not be declared void because its effect may, to some extent, be a regulation of commerce with foreign nations or among the several states: *Minneapolis etc. Ry. v. Milner*, 57 Fed. Rep. 276; *Gilman v. Philadelphia*, 3 Wall. 713. On the other hand, it must also be conceded that a state will not be permitted, under the guise of a quarantine law, to regulate or prohibit commerce, and that a law enacted for the avowed purpose of promoting the public health or welfare will be scrutinized for the purpose of ascertaining whether it does not proceed beyond that purpose and impose regulations of a commercial character not required for an efficient quarantine system. A statute of the state of Missouri declared that no Texas, Mexican, or Indian cattle should be driven or otherwise conveyed into or remain in any county of the state from the first day of March to the first day of November of each year by any person whomsoever, but provided that this prohibition should not apply to any cattle which had been kept the entire previous winter in the state, and that when such cattle should come across the line of the state loaded upon a railway car or steamboat and should pass through the state without being unloaded, their transportation should not be forbidden, but that the railroad or steamboat owners should be responsible for all damages which might result from the disease called Spanish or Texas fever occurring along the line of transportation, and that the existence of such disease along such line should be prima facie evidence that it had been communicated by such transportation, and that any person bringing into the state any Texas, Mexican, or Indian cattle in violation of the act should be liable for all damages sustained on

account of the disease communicated by the cattle. An action was brought against the railroad company for damages alleged to have resulted from its violation of the statute. The defendant in the action insisted that the statute relied upon was unconstitutional because of its conflict with the power of congress to regulate commerce. His contention was overruled by the trial court, but was afterward sustained by the supreme court of the United States, on the ground that while a state, "for the purpose of self-protection, may establish quarantine and reasonable inspection laws, it may not interfere with transportation in or through the state beyond what is absolutely necessary for its self-protection. It may not, under the cover of extending its police powers, substantially prohibit or burden either foreign or interstate commerce." The court referred to and in effect overruled a decision of the supreme court of Illinois upon the same subject, saying: "We have not overlooked the decisions of very respectable courts in Illinois, where statutes similar to the one we have now before us have been sustained: *Yeazel v. Alexander*, 58 Ill. 254. Regarding the statutes as mere police regulations, intended to protect domestic cattle against infectious disease, those courts have refused to inquire whether the prohibition did not extend beyond the danger to be apprehended, and whether, therefore, the statutes were not something more than exertions of police power. That inquiry, they have said, was for the legislature and not for the courts. With this we cannot concur. The police power of a state cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise; and, under color of it, objects not within its scope cannot be secured at the expense of the protection afforded by the federal constitution. And as its range sometimes comes very near to the field committed by the constitution to Congress, it is the duty of the courts to guard vigilantly against any needless intrusion": *Railroad v. Husen*, 95 U. S. 465, 473. We think, however, that there is little or no doubt of the correctness of the subsequent decision of the supreme court of Missouri affirming that the state has authority to provide reasonable regulations prescribing the mode of transportation of diseased or infected animals through the state and restricting the manner of such transportation so as to prevent the spread of disease and contagion, and we even doubt the concession made by that court, that the state is without power to forbid the transportation through it of livestock then so diseased or infected as to probably prove injurious to the health of other livestock within the state: *Grimes v. Eddy*, 126 Mo. 168; *post*, p. 653; *Kimmish v. Ball*, 129 U. S. 217. So, as shown by the court in the principal case, the state authorities may provide for the inspection and disinfection of the baggage and personal effects of travelers coming from infected ports or places in other states or in a foreign country, and may place such restraints upon such travelers in the nature of quarantine regulations as due regard for the health and safety of the citizens of the state may reasonably dictate.

A state statute which professes to be a health law or regulation may justly be declared unconstitutional and void, because, while it purports to be but an exercise of the police power, it is an unnecessary invasion of some right assured to the citizen by the constitution of the state. Thus, there are in most, if not in all, of the states certain personal rights, the existence of which is either implied or guaranteed in express terms by their constitutions, and which are reserved from denial or unnecessary impairment by the state legislatures, such as the right of personal liberty and of acquiring and protecting private property. These rights must often yield in some degree

to laws passed in the exercise of the police power of the state, and perhaps in every case in which a health law or regulation is necessary, or in which it cannot clearly be said to have no real connection with the promoting of the public health, it will not be denied effect because it may infringe upon some right of personal liberty, or of acquiring and protecting private property. At the same time, if the courts can judicially know that a law passed for the assumed purpose of advancing the public health in truth imposes some regulation of an arbitrary character, and which can have no real connection with its avowed purpose, the courts will declare it invalid. As an instance of this may be mentioned an act entitled "An act to improve the public health by prohibiting the manufacture of cigars and the preparation of tobacco in every form in tenement houses in certain cases and regulating the use of tenement houses in certain cases." This act having been assailed as unconstitutional, the court of appeals of New York said: "This law was not intended to protect the health of those engaged in cigar-making, as they are allowed to manufacture cigars everywhere, except in the forbidden tenement houses. It cannot be perceived how the cigarmaker is to be improved in his health or his morals by forcing him from his home and its hallowed associations and beneficent influences to ply his trade elsewhere. It is not intended to protect the health of that portion of the public not residing in the forbidden tenement houses, and cigars are allowed to be manufactured in private houses, in large factories and shops, in the too-crowded cities, and in all other parts of the state. What possible relation can cigar-making in any building have to the health of the general public?" In attempting to state the general test by which health laws may be declared unconstitutional, the court said: "When a health law is challenged in the courts as unconstitutional on the ground that it arbitrarily interferes with personal liberty and private property without due process of law, the court must be able to see that it has, at least in fact, some relation to the public health; that the public health is the end actually aimed at, and that it is appropriate and adapted to that end. This we have not been able to see in this law, and that we must, therefore, pronounce unconstitutional and void": *In Matter of Jacobs*, 98 N. Y. 98; 50 Am. Rep. 636. The same court in a subsequent case expressed substantially the same thought in somewhat different language, saying: "The act must tend in some appreciable and clear way toward the accomplishment of some one of the purposes which the legislature has the right to accomplish under the exercise of the police power. It must not be exercised ostensibly in favor of the promotion of some subject, while really it is an invasion thereof, and for a distinct and totally different purpose, and the courts will not be prevented from looking at the true character of the act as developed by its provisions by any statement in the act itself or in its title showing that it was ostensibly passed for some object within the police power. The court must be enabled to see some clear and real connection between the assumed purpose of the law and the actual provisions thereof, and it must see that the latter do tend in some plain and appreciable manner toward the accomplishment of some of the objects for which the legislature may use this power": *Health Department v. Rector*, 145 N. Y. 32; 45 Am. St. Rep. 579. See, also, *Smiley v. MacDonald*, 42 Neb. 5; *post*, p. 684.

Municipal Regulations.—The power which the state has, through its legislature, to enact quarantine regulations may be delegated to inferior legislative or quasi-legislative bodies. In fact, the enforcement of these regulations falls upon county and municipal authorities much more frequently than upon

officers acting directly as representatives or agents of the state. It may often be difficult to determine whether, by a municipal charter or otherwise, the state has undertaken to delegate to an inferior body the power to enact and enforce regulations of a quarantine nature or for the promotion of public health; but when this doubt is removed there is no difficulty in maintaining the constitutional validity of the delegation. "Our municipal corporations are usually invested with express power to preserve the health and safety of the inhabitants. This is, indeed, one of the chief purposes of local government, and reasonable by-laws in relation thereto have always been sustained in England as within the incidental authority of corporations to ordain": Dillon on Municipal Corporations, sec. 369. We do not know of any American case in which the power to enact ordinances of this character has been either affirmed or denied when the charter of the municipality whose ordinance or other quarantine regulation was in question was silent with reference to its authority to act for the protection and preservation of the public health, though there are decisions which seem to deny (*New Decatur v. Berry*, 90 Ala. 432; 24 Am. St. Rep. 827), and others which seem to assume, the general power in all municipalities to act for this purpose, and that any general state regulation upon the subject "ought not to be regarded as detracting from the general scope of municipal governments, unless that legislative intent clearly appear": *Nicoulin v. Lowry*, 49 N. J. L. 391.

Whatever doubt there may be of the power of municipalities whose charters do not contain any express authority to them to enact quarantine regulations and to make and enforce other rules for the promotion of the public health, there can be no question that the state legislature may invest municipalities and inferior bodies with authority upon this subject little, if any, less ample as to the locality within their jurisdiction than is the authority of the state legislature over the territory within its jurisdiction: *Town of Greensboro v. Ehrenrich*, 80 Ala. 579; 60 Am. Rep. 130; *Metcalf v. St. Louis*, 11 Mo. 102; *St. Louis v. McCoy*, 18 Mo. 238; *Aaron v. Broiles*, 64 Tex. 316; 53 Am. Rep. 764; *Haverty v. Bass*, 66 Me. 71; *Harrison v. Mayor of Baltimore*, 1 Gill, 264. And the authority of the municipality is not necessarily restricted to the municipal limits, but may, by the legislature, be extended over adjacent territory (*Harrison v. Mayor of Baltimore*, 1 Gill, 264), doubtless upon the ground that its action, even within the municipality, cannot be efficient where it is denied control of territory so close thereto that contagions, or other causes of disease, if allowed to obtain a footing, must reasonably be expected to invade the municipal limits. There may, however, be instances in which the legislature, in attempting to authorize quarantine regulations, may undertake to delegate an authority which it is not permitted to confer upon any other body. Thus a statute which created a board of viticultural commissioners and authorized it to declare and enforce "rules and regulations in the nature of quarantine to govern the manner of and restrict and prohibit the importation into the state, and the disposition and disposal within the state, of infected vines, cuttings, and empty fruit boxes," and declared that a willful violation of the rules of the board should be a misdemeanor, was declared to be unconstitutional, because the legislature had not authority to confer upon an officer or board the power to declare what acts should constitute a misdemeanor: *Ex parte Cox*, 63 Cal. 21.

Certainly the state legislature cannot delegate an authority which it does not itself possess, and the authority, when delegated, is subject to the same constitutional restraints as if it were attempted to be exercised by the

state. One of these, as we have already seen, is that a quarantine regulation shall not unreasonably restrain trade, nor shall it, in the guise of a health or quarantine rule or regulation, regulate or prohibit commerce. Therefore, though a municipality is by its charter authorized to establish and enforce quarantine and other regulations necessary to the health of the town and its inhabitants, and to prevent and remove nuisances, an ordinance enacted by it, declaring it to be unlawful for any person to bring into or offer for sale within it second-hand clothing, without having first produced satisfactory proof to the mayor that such clothing did not come from a district or locality in which any contagion or infection was prevailing, or had prevailed, was adjudged unreasonable and void, in the absence of any epidemic apparently calling for this extraordinary action: *Town of Kosciusko v. Slonberg*, 68 Miss. 469; 24 Am. St. Rep. 281. Still more objectionable is an ordinance purporting to prohibit any person from selling or otherwise dealing in second-hand or cast-off garments, blankets, or bedding, except that which had not been imported. In determining an ordinance of this character to be invalid, the court conceded the undoubted power to pass ordinances for the prevention of the introduction of infectious or contagious diseases and the preservation of the public health, and that ordinances having for their object the protection of the health of the inhabitants "are generally regarded as police regulations, subject to which the individual holds his rights of liberty and property. Presumptions will be indulged in favor of their necessity, propriety, and validity, and when not unreasonable, nor partial, nor oppressive nor inconsistent with the legislative policy of the state, should and will be sustained"; but further declared that, notwithstanding any grant of general authority to pass ordinances deemed necessary and proper to prevent the introduction of infectious diseases, and to preserve the public health, no ordinance can be sustained if in restraint of trade, or contravening the general laws and public policy, and that "it will not be presumed that the legislature intended to clothe the municipal government with power to dispense with the requisites of a valid ordinance, and though the necessity and propriety of a particular ordinance is primarily of legislative determination, its character, whether reasonable, impartial, or consistent with the state policy, are questions for the court." The ordinance in question was condemned because its operation "reaches beyond the scope of necessary protection and prevention into the domain of restraint of lawful trade by permanently prohibiting the importation, selling, or otherwise dealing in the enumerated articles, though they may not have been used by persons or in districts infected with such diseases. Municipal authorities having power to abate nuisances cannot absolutely prohibit a lawful business not necessarily a nuisance, but may abate it when so carried on as to constitute a nuisance. They cannot, under the claim of exercising the police power, substantially prohibit a lawful trade, unless it is so conducted as to be injurious or dangerous to the public health": *Town of Greensboro v. Ehrenreich*, 80 Ala. 579; 60 Am. Rep. 130.

When a municipality has acted within the scope of the authority delegated to it, a regulation by it imposed cannot be reviewed and declared void by the courts, upon the ground that the discretion vested in the municipal authorities has been improvidently exercised, and that the regulation in question is not the one best calculated to promote the objects which the municipality was entitled to seek. Speaking upon this question, the supreme court of Missouri, in an early and leading case, said: "The only question in the present case is, whether the ordinance of the city is

itself a quarantine regulation in its scope and design. If it is, this court will not enter into an examination of the question whether it is the most suitable regulation that could be adopted to protect the health of the city. If the real design is a quarantine regulation to guard against the introduction of disease into the city, we will not undertake to determine whether other measures interfering less with commerce could not as well have accomplished the object. The general assembly has, by an act of incorporation, intrusted the city government with the power 'to make regulations to prevent the introduction of contagious diseases into the city, to make quarantine laws for that purpose, and enforce the same within ten miles of the city.' In the exercise of this power the government of the city must have a discretion as wide as that possessed by the government of the state in choosing between different measures for accomplishing the end. When an ordinance is passed under this grant of power, it is in force by the authority of the state, and it is to be interpreted and executed as if it had been passed by the general assembly": *City of St. Louis v. Boffinger*, 19 Mo. 13.

A municipality to which has been delegated authority to adopt and enforce ordinances for the protection of the public health may, in time of epidemic, provide for the medical care and treatment of poor persons residing within the city (*Thomas v. Mason*, 39 W. Va. 526), and may impose penalties upon physicians who do not give immediate notice in writing of the name and sex of any person and of the name of the disease with which he is afflicted, together with the location of the house or room in which he is to be found: *People v. Braly*, 90 Mich. 459; or may rent a house to be used for the seclusion of persons having an infectious or pestilential disease: *City of Anderson v. O'Conner*, 98 Ind. 168; and contract with persons to perform service or supply food and other necessary articles for use at such house, and pay for articles taken from it for destruction: *McPherson v. Nichols*, 48 Kan. 430. A municipality may also make and enforce many regulations which interfere with commerce, provided such interference is a necessary part of efficient quarantine regulation. Hence, a vessel approaching a city may be required to anchor before landing, and to submit to an inspection (*Dubois v. Augusta*, Dud. 30), and may be detained for the purpose of cleansing and purification, and to submit to such further measures as may be necessary to prevent disease from being communicated by passengers thereon: *Harrison v. Mayor of Baltimore*, 1 Gill, 264; *St. Louis v. McCoy*, 18 Mo. 238, and the exclusive privilege of removing dead animals and garbage from the city may be conferred upon one person or corporation: *Smiley v. McDonald*, 42 Neb. 5, *post*, p. 000. A local board of health may require all rags arriving from a foreign port to be disinfected under the supervision of an officer of the board, in a manner satisfactory to it, before being discharged, and may exact from their owner the expenses of such disinfection: *Train v. Boston Disinfecting Co.*, 144 Mass. 523; 59 Am. Rep. 113.

As an essential to the power to provide for the public health and prevent the spread of contagion would seem to be the right to take persons suffering therefrom to some place where they would not come in contact with the citizens of the municipality, and where the probability of their disease being communicated from them to others would be reduced to the minimum, the exercise of this power may involve the taking of a citizen from his own home and from the care of his friends and relatives, and placing him in the custody of public servants, who may or may not be so solicitous for his welfare and recovery as are the persons of his own household. The power, however, of

municipal and other quarantine authorities to seize and confine private citizens under such circumstances has been assumed to exist: Tiedeman on Police Power, sec. 32; though the authorities in support of it are quite meager, and none of them seem to have considered the question in a manner commensurate with its importance. The statutes upon the subject have not, so far as we can ascertain, authorized the removal of a person from his own home to a pesthouse or other place of confinement, except when such removal can take place without imminent danger to his life. Under a statute of this character, it has been held that the municipal officers may, without any warrant or judicial proceeding, take from the arms of a mother her child believed to be sick with the smallpox, for the purpose of removing it to a city hospital, and that the statute is free from constitutional objections: *Wilkinson v. Long Rapids*, 74 Mich. 63; *Haverty v. Bass*, 66 Me. 71; *Aaron v. Broiles*, 64 Tex. 316; 53 Am. Rep. 764.

The power to act for the preservation and promotion of the public health, whether it be exercised by the state or by a municipal or other local authority, is not restricted to mere quarantine regulations, such as arresting persons or property and detaining them until they have been inspected or disinfected, or until the probability of disease being communicated by them is reduced to a minimum, but extends to all measures of a preventative character which are in good faith devised by the legislative authority, or by officers whom it had authorized to act, and which do not invade some constitutional right or privilege of the citizen in respect to his person or property. Any thing or cause which imperils the public health is a nuisance, and, under the general power confided to municipalities to abate and prevent nuisances, they may do a great variety of acts, and formulate and enforce a great variety of regulations, not only for the purpose of preventing the introduction and spread of contagion, but also to render other diseases less probable and fatal. Hence, they may forbid the erection and maintenance of a private hospital within the municipal limits: *Milne v. Davidson*, 5 Mart., N. S., 409; 16 Am. Dec. 189; may require lots upon which waters accumulate and become stagnant to be drained or filled up to the level of the adjacent property: *Charleston v. Werner*, 38 S. C. 488; 37 Am. St. Rep. 776; *Rochester v. Simpson*, 134 N. Y. 414; offensive and putrid substances, and all nuisances having a tendency to endanger the health of citizens, to be removed from streets, alleys, highways, wharves, docks, and from any other part of the city: *Kennedy v. Board of Health*, 2 Pa. St. 366; every building used as a dwelling situated on a street in which there is a public sewer to have sufficient water-closets connected therewith: *Commonwealth v. Roberts*, 155 Mass. 281; every tenement house erected after a date specified to have water furnished in sufficient quantity at one or more places on each floor occupied, or intended to be occupied, by one or more families: *Health Department v. Rector*, 145 N. Y. 32; 45 Am. St. Rep. 579; all garbage to be removed through and out of the city in closed water-tight carts or wagons marked "Garbage": *People v. Gordon*, 81 Mich. 306; 21 Am. St. Rep. 524.

To undertake to enumerate the different measures which may be taken with a view of promoting the public health would be to enter upon a more extensive treatment of the topic of nuisances than can be here expected. There is one subject, however, which is so especially connected with that now under consideration that we shall speak of it, though not at any great length, and this is of the power of the legislature or of municipalities or boards of health to declare what are nuisances, and, as a result of such declaration, to authorize the destruction of property or the interference with

personal liberty. There is no "limitation of power which precludes the legislature from enlarging the category of public nuisances, or from declaring places or property, used to the detriment of the public interests or to the injury of the health, morals, or welfare of the community, public nuisances, though not such at the common law. There are, of course, limitations upon the exercise of this power. The legislature cannot use it as a cover for withdrawing property from the protection of the law, or arbitrarily, where no public right or interest is involved, declare property a nuisance for the purpose of devoting it to destruction. If the court can judicially see that the statute is a mere evasion, or was framed for the purpose of individual oppression, it will set it aside as unconstitutional, but not otherwise": *Lawton v. Steele*, 119 N. Y. 226; 16 Am. St. Rep. 813. This power to enlarge the category of nuisances does not exclude the authority of the judicial department to review its action, at least to the extent of inquiring whether the thing declared to be a nuisance is not in fact harmless, and of such a character that to forbid its continuance is to deprive the citizen of a personal or property right assured to him by the constitution; and the courts will not give effect to a legislative declaration that an act or thing is a nuisance or unlawful when it cannot in fact be so: *City of Janesville v. Carpenter*, 77 Wis. 288; 20 Am. St. Rep. 123; *City of Grand Rapids v. Powers*, 89 Mich. 94; 28 Am. St. Rep. 276; *First Nat. Bank v. Sarlls*, 129 Ind. 201; 28 Am. St. Rep. 185; note to *Milne v. Davidson*, 16 Am. Dec. 195.

Municipal authorities and local boards of health are frequently given power to abate nuisances, and, in fact, to declare things to be nuisances which, in their judgment, are prejudicial to the public health. If their judgment is final, the functions which they exercise are necessarily judicial in their nature, and, like all other judicial functions, cannot be validly exercised, except after the parties whose interests are affected have been given some notice of the proposed action, and some opportunity to show that it ought not to be taken. Such action as the authorities constituting a board of health may take need not, unless the statute so requires, be preceded by any notice to the parties interested, and such decision as the board may make it may make in their absence, and without according them any opportunity to be heard: *City of Salem v. Eastern Ry. Co.*, 98 Mass. 431; 96 Am. Dec. 650; *People v. Board of Health*, 140 N. Y. 1; 37 Am. St. Rep. 522. This fact seems to be conclusive against the claim that their authority is of a judicial character, and their conclusions binding upon the parties affected: *Board of Health v. Heister*, 37 N. Y. 661. There are, indeed, decisions from which the inference may fairly be drawn that their decision that a thing or a condition of affairs is a nuisance is conclusive upon that question, and leaves the party whose property or other right may be affected as the result of the decision without any right to challenge its correctness or otherwise to avoid the consequences naturally flowing from it: *Van Wormer v. Mayor of Albany*, 15 Wend. 262; *Kennedy v. Board of Health*, 2 Pa. St. 366; *Green v. Mayor of Savannah*, 6 Ga. 1. This view cannot, in our judgment, be sustained. A municipal corporation cannot, by ordinance, declare that to be a nuisance which is not, and bind any person by the declaration: *Ex parte O'Leary*, 65 Miss. 80; 7 Am. St. Rep. 640; *Village of Des Plaines v. Poyer*, 123 Ill. 348; 5 Am. St. Rep. 524; *Jackson v. Castle*, 82 Me. 579; *Pine City v. Munch*, 42 Minn. 342; *Tissott v. Great South Tel. etc. Co.*, 39 La. Ann. 996; 4 Am. St. Rep. 248. A board of health, or officers performing duties similar to those commonly deputed to such a board, cannot do by their acts that which the municipality itself has no power to do. If such a board is au-

thorized to act when a nuisance exists, or to suppress or abate nuisances, it must justify its action by proving the existence of the nuisance, or, at least, it cannot justify such action if the party whose interests have been affected can show that there was in fact no nuisance. Perhaps its decision on the question may be received as *prima facie* evidence of the nuisance, but if this evidence is overcome, then the action is treated as unauthorized, and the officers themselves as acting beyond their authority, and therefore personally answerable for their wrongdoing: *Hutton v. City of Camden*, 39 N. J. L. 122; 23 Am. Rep. 206; *People v. Board of Health*, 140 N. Y. 1; 37 Am. St. Rep. 522; *Coe v. Schultz*, 47 Barb. 64; *Orlando v. Pragg*, 31 Fla. 111; 34 Am. St. Rep. 17; *Wreford v. People*, 14 Mich. 41; *Harmison v. City of Lewiston*, 153 Ill. 313; 46 Am. St. Rep. 893; *Everett v. Council Bluffs*, 46 Iowa, 66; *Yates v. Milwaukee*, 10 Wall. 497; note to *Milne v. Davidson*, 16 Am. Dec. 195. Diseased animals which, from the character of their malady, are liable to inflict injury by communicating it to others of the species or to human beings, are nuisances, and their destruction, as such, may be authorized by law, without any previous inquiry of a judicial character, and therefore without any notice to their owner, or any opportunity on his part to show that they are not infected with the supposed contagion. The person or officer, however, who undertakes to execute the law must restrict his action to the cases contemplated by it, and is therefore answerable to the owner if it be shown that the animals were not in fact diseased, and therefore ought not to have been destroyed: Note to *Blair v. Forehand*, 97 Am. Dec. 88; *Newark etc. Ry. Co. v. Hunt*, 50 N. J. L. 308; *Pearson v. Zehr*, 138 Ill. 48; 32 Am. St. Rep. 113; *Miller v. Horton*, 152 Mass. 540; 23 Am. St. Rep. 850.

There may, however, arise cases in which the question is not so clear as to warrant the judiciary in affirming that the thing declared to be a nuisance is not such, and in which the health or quarantine officers may be conclusively regarded as acting within the legislative or ministerial discretion vested in them. This view has been thus expressed: "While under a general grant of power over nuisances town authorities have no power to adopt an ordinance declaring a thing a nuisance which in fact is clearly not one, still, in doubtful cases, where a thing might or might not be a nuisance, depending upon a variety of circumstances requiring judgment and discretion on the part of the town authorities in exercising their legislative functions, their action, under such circumstances, would be conclusive of the question": *Harmison v. City of Lewiston*, 153 Ill. 313; 46 Am. St. Rep. 893; *North Chicago etc. Ry. v. Lake View*, 105 Ill. 207; 44 Am. Rep. 788. Hence, it was held that the board of health had power to declare slaughter-houses within a municipality dangerous to the public health, and that their owners had not the right to a jury trial upon that question: *Metropolitan Board of Health v. Heister*, 37 N. Y. 661.

Vaccination is generally believed to act as a preventive of the spread of smallpox, and, while various statutes have been adopted to encourage it, there has not, so far as we are aware, yet arisen any case challenging the power of the legislature to compel citizens to submit to it. There have, indeed, been cases questioning the power of the legislature to provide for vaccination as a condition upon which children might be permitted to attend the public schools, and statutes imposing this condition have, so far as questioned, been sustained: *Abeel v. Clark*, 84 Cal. 226; *Duffield v. Williamsport School District*, 162 Pa. St. 476; *Bissell v. Davison*, 60 Conn. 186; 48 Am. St. Rep. 000; and the reasoning employed by the court goes far toward sustaining the law requiring compulsory vaccination in all cases.

Thus, in the case cited from the supreme court of California, it was said: "It is suggested that the subject of the vaccination act is not within the scope of a police regulation. The legislature has power to enact such laws as it may deem necessary, not repugnant to the constitution, to secure and maintain the health and prosperity of the state by subjecting both persons and property to such reasonable restraints and burdens as will effectuate such objects. Vaccination being the most effective method of preventing the spread of the disease referred to, it was for the legislature to determine whether the scholars of the public schools should be subject to it; and we think it was justified in deeming it a necessary and salutary burden to impose upon that general class." In England various statutes have been enacted and enforced providing for compulsory vaccination, and imposing penalties upon parents neglecting to procure vaccination for their children: *Regina v. Justices*, L. R. 17 Q. B. Div. 191; *Dutton v. Atkins*, L. R. 6 Q. B. 373; *Allen v. Worthy*, L. R. 5 Q. B. 163; but, as there is no constitution in that country limiting the authority of parliament to enact statutes, these decisions can be of little or no relevancy under our system of constitutional limitations.

As Instances of Further Regulations which may be imposed and enforced with a view to promoting the public health, the following may be given: A regulation limiting the area of soil which may be cultivated within a municipality: *Town Council v. Pressley*, 33 S. C. 56; 26 Am. St. Rep. 659; providing a place within a municipality where animals might be slaughtered for consumption therein, and putting such place under the management of the commissioner of health, and making it his duty to see that it is conducted in a clean and orderly manner, and requiring all persons licensed to sell fresh meat within a city to have it inspected and approved by the commissioner of health, and imposing penalties for the sale of such meat unless so inspected: *Huesing v. City of Rock Island*, 128 Ill. 465; 15 Am. St. Rep. 129; *City of St. Paul v. Byrnes*, 38 Minn. 176; *Ex parte Byrd*, 84 Ala. 17; 5 Am. St. Rep. 328; controlling the time and mode of cleaning sinks and cesspools: *State v. Lowery*, 49 N. J. L. 391; prohibiting the throwing into or depositing upon the public streets, except in certain designated places, of any glass, broken ware, dirt, rubbish, garbage, or filth: *Ex parte Cassinello*, 62 Cal. 538; prohibiting any person not duly licensed by the municipal authorities from removing house dirt and offal from the city: *Ex parte Vandine*, 6 Pick. 187; 17 Am. Dec. 351; prohibiting the keeping of swine within particular districts of a city: *Commonwealth v. Patch*, 97 Mass. 221; *State v. Holcomb*, 68 Iowa, 107; 56 Am. Rep. 853; regulating the removal of house dirt, nightsoil, refuse, offal, and filth, and committing the exercise of that right to persons licensed by the municipality: *Boehn v. Mayor of Baltimore*, 61 Md. 259; regulations as to the place and mode in which the burial of the dead may be permitted: *Austin v. Austin Cemetery Assn.*, 87 Tex. 330; *ante*, p. 114; *New Orleans v. St. Louis Church*, 11 La. Ann. 244; *Kincaid's Appeal*, 66 Pa. St. 411; 5 Am. Rep. 377; *Commonwealth v. Fahey*, 5 Cush. 408; *Commonwealth v. Goodrich*, 13 Allen, 546; forbidding the exercise "of the trade or employment of preparing neat's-foot oil, tallow, or glue stock": *Commonwealth v. Patch*, 97 Mass. 221; *City of Taunton v. Taylor*, 116 Mass. 254.

Of course, the action of the health officers can in no instance be supported when not within the authority which the statute has attempted to confer upon them, and when their action involves either the destruction of property or a deprivation of personal liberty, it cannot be sustained unless

the statute quite clearly contemplates or authorizes it. Therefore, the authority to isolate all persons or things infected or exposed to contagious disease, and to provide thorough and safe vaccination for all persons in need thereof, does not warrant the detention and quarantining of persons who refuse to be vaccinated, and who are not shown to have been exposed to disease except by evidence that they have been carrying on a general express business in a neighborhood in which many cases of smallpox have existed: *In re Smith*, 146 N. Y. 68. If the general laws regulate the manner in which vessels shall be detained and examined, a county board of health is not authorized to impose different regulations upon the same subject: *Ex parte O'Donovan*, 24 Fla. 281. Hence, officers having power to cause quarantine to be performed have no right to take a vessel in which a contagious disease is found into their own possession and control to the exclusion of its owners: *Mitchell v. City of Rockland*, 41 Me. 363; 66 Am. Dec. 252; 45 Me. 496; nor have they any power to take possession of a house in which is a person too ill with contagion to be removed under a statute authorizing them to make provision for nurses and other assistants for such person, when necessary: *Brown v. Murdock*, 140 Mass. 314; *Spring v. Hyde Park*, 137 Mass. 554; 50 Am. Rep. 334.

Liability of Municipalities.—In so far as a municipality undertakes the duty of making and enforcing quarantine regulations and other laws for the promotion of the public health, it is in the performance of governmental functions, and its officers are not agents for whose action or inaction it is answerable. The liability of cities for the negligence and other misconduct of their officers and agents has quite recently received extensive consideration in this series: Note to *Goddard v. Inhabitants of Harpswell*, 30 Am. St. Rep. 376-412. And the principles there stated will be found to control cases in which cities are sought to be held answerable for health officers. In so far as they perform, or seek to perform, public or governmental functions the city is no more liable than it is for the negligence or misfeasance of its policemen in the discharge of the duties intrusted by law to them: *Bryant v. City of St. Paul*, 33 Minn. 289; 53 Am. Rep. 31; *Ogg v. City of Lansing*, 35 Iowa, 495; 14 Am. Rep. 499; *Hill v. Board of Aldermen of Charlotte*, 72 N. C. 55; 21 Am. Rep. 451; *Forbes v. Board of Health*, 28 Fla. 26, 45; *White v. Town of Marshfield*, 48 Vt. 20; *Lynde v. City of Rockland*, 66 Me. 209; *Barbour v. City of Ellsworth*, 67 Me. 294; *Mitchell v. City of Rockland*, 41 Me. 363; 66 Am. Dec. 252; *James v. Harrodsburg*, 85 Ky. 191; 7 Am. St. Rep. 589. If, however, the municipality, acting through its health officers or otherwise, creates a nuisance injurious to private property, it is answerable for the damages resulting; and this rule has been applied in favor of a person whose property was damaged by the erection and maintenance of a pesthouse in close proximity to his dwelling: *Haag v. Board of Commrs.*, 60 Ind. 511; 28 Am. Rep. 654; or by the discharge on his premises of the foul contents of a sewer: *Franklin Wharf Co. v. Portland*, 67 Me. 46; 24 Am. Rep. 1. See, however, *City of Fort Worth v. Crawford*, 64 Tex. 202; 53 Am. Rep. 753.

Liability of Health Officers.—Health officers acting within the limits of their authority are not liable for the consequences of a mistake of judgment when proceeding with good faith and with reasonable caution: *Raymond v. Fish*, 51 Conn. 80; 50 Am. Rep. 3, but they are answerable when acting in excess of their authority: *Beers v. Board of Health*, 35 La. Ann. 1132; 48 Am. Rep. 256; *Markham v. Brown*, 37 Ga. 277; 92 Am. Dec. 73; as where they take exclusive possession of the property of a private citizen: *Brown v. Murdock*, 140

Mass. 314; or proceed to abate as a nuisance that which is not a nuisance in fact: *People v. Board of Health*, 140 N. Y. 1; 37 Am. St. Rep. 522. Health officers, in the performance of their duties, are brought in contact with persons who are too ill to protect themselves, and for whose comfort and protection such officers ought to exercise a very high degree of care. In an action brought against such officers to recover damages alleged to have been received by a mother and child who were taken by the officers and removed to a place of isolation, the trial court instructed the jury "that if those who removed the mother and child were acting under the authority of law, then, in order to find against them, they must have acted maliciously, willfully, and oppressively, and with gross negligence." This instruction was held to be erroneous, and the court said: "If the defendants caused the removal of the plaintiff's wife and child without the care and precaution which the circumstances required, and if the deaths resulted therefrom, then, in our opinion, they are responsible, and the fact that they were city officers and acting under a city ordinance does not shield them. The jury were told that the board of health while acting under the city ordinances in devising plans to protect the city against disease were acting in a judicial capacity, and were not responsible for errors or mistakes of judgment. There was nothing judicial in the act of moving this woman and child, and the question is not whether the policy was wise or unwise, but whether there was a wrong done in one of the details of its execution." In this case the evidence justified the inference that the board of health provided a tent in which a woman and child afflicted with the smallpox were placed; that the rain and wind beat in and blew through the tent, wetting the bedclothing, the child, and the mother, and everything in the tent, and that soon thereafter the child grew worse and died. Under these circumstances, the action of the trial court in exonerating the defendants from liability was reversed, and the cause remanded for a new trial: *Aaron v. Broiles*, 64 Tex. 316; 53 Am. Rep. 764.

Expenses of Quarantine and Disinfection.—When quarantine regulations provide for the disinfection of goods or of a vessel which has probably been exposed to contagion, the services rendered may be regarded as for the benefit of such goods or vessel, because from such services they are relieved from the suspicion of being dangerous, and are exonerated from further detention and purification, and the charge for the services so performed may be imposed on the owner of the property, or a lien may be created upon such property for the amount of such charges: *Harrison v. Mayor of Baltimore*, 1 Gill, 264; *Ferrari v. Board of Health*, 24 Fla. 390; *Morgan's S. S. Co. v. Louisiana Board of Health*, 118 U. S. 455. The constitution of the United States, however, declares that, "No state shall, without the consent of Congress, lay any duty on tonnage." Therefore a quarantine charge against a vessel must not be based upon its tonnage: *Peete v. Morgan*, 19 Wall. 581. No recovery can be had for services officiously or voluntarily performed in the disinfection of a vessel or of goods, and therefore he who assumes and performs this duty without having been ordered to do so by the proper officials is not entitled to compensation therefor: *Lockwood v. Bartlett*, 130 N. Y. 340.

Statutes Imposing Liability for Spreading Contagion.—To expose a person or animals constituting his private property to contagion is likely to result in his serious pecuniary loss, and there is no doubt of the power of the legislature to provide that the person through whose act or negligence such loss was brought about shall be answerable therefor: *Grimes v. Eddy*, 126 Mo. 168;

post, p. 000. The case of *Kimmish v. Ball*, 129 U. S. 217, involved the validity of a statute of the state of Iowa making a person having in his possession within it any Texas cattle which had not been wintered north of the southern boundary of Missouri and Kansas liable for any damages that might accrue from allowing them to run at large and thereby spread the disease known as Texas fever, it having been proved that cattle coming from the state of Texas were infected with the germs of a distemper which were communicated to domestic cattle by contact or by feeding upon the same range or pasture. The statute assailed was sustained on the ground that, "all animals thus infected may be excluded from the state by its laws until they are cured of the disease, or, at least, until some mode of transporting them without danger of spreading it is devised." The court further said: "The case is, therefore, reduced to this: whether the state may not provide that whoever permits diseased cattle in his possession to run at large within its limits shall be liable for any damages caused by the spread of the disease occasioned thereby; and upon that we do not entertain the slightest doubt. Our answer, therefore, to the first question upon which the judges below differed is in the negative, that the section in question is not unconstitutional by reason of any conflict with the commercial clause of the constitution. As to the second question, our answer is also in the negative. There is no denial of any rights and privileges to citizens of other states which are accorded to citizens of Iowa. No one can allow diseased cattle to run at large in Iowa without being held responsible for the damages caused by the spread of disease thereby; and the clause of the constitution declaring that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states does not give nonresident citizens of Iowa any greater privileges and immunities in that state than her own citizens there enjoy. So far as liability is concerned for the act mentioned, citizens of other states and citizens of Iowa stand upon the same footing: *Paul v. Virginia*, 8 Wall. 168."

Liability in the Absence of Statutes.—No special statutory provision upon the subject is required to make the negligent or willful exposing of men or other animals to contagious disease unlawful, or to subject the guilty party to punishment and to liability for the damages resulting from his wrongful act. Thus, in the case of the *King v. Vantandillo*, 4 Maule & S. 73, the defendant was indicted for carrying her child, while infected with smallpox, along a public highway. "Le Blanc, J., in passing sentence observed that, although the court had not found upon its records any prosecution for this specific offense, yet there could be no doubt in point of law that if a person unlawfully, injuriously, and with full knowledge of the fact exposes in a public highway a person infected with a contagious disease, it is a common nuisance to all the subjects, and indictable as such. However, the court was not disposed upon the present occasion to impute to the defendant an intention of being the cause of the consequences which had followed. Neither did they pronounce that every person who inoculated for this disease was guilty of an offense, provided it was done in a proper manner, and the patient was kept from the society of others so as not to endanger the communication of the disease. In such a case the law did not pronounce it to be an offense. But no person having a disorder of this description upon him ought to be publicly exposed to the endangering the health and lives of the rest of the subjects. The defendant was sentenced to imprisonment in the custody of the marshal for three calendar months."

"Domestic animals which have an infectious or contagious disease be-

come a nuisance when the care and management of them by their owners are such as to expose the domestic animals of others to the infection or contagion, or, when they are sold, to be put with others to one who is not informed of their condition. The question of liability is one of negligence and the want of good faith": Cooley on Torts, 2d ed., 724. Therefore, if a man's animals are by his wrongful act caused to trespass upon the land of another, or if he, whether rightfully or wrongfully, takes them there, at the time knowing them to be afflicted with a contagious disease, which they communicate to other animals there being and not belonging to him, he is answerable to their owner for the damages thereby inflicted: *Bradford v. Floyd*, 80 Mo. 207; *Hawks v. Locke*, 139 Mass. 205; 52 Am. Rep. 702; *Mills v. New York R. R.*, 2 Rob. 326; affirmed 41 N. Y. 619; *Hite v. Blandford*, 45 Ill. 9; *Anderson v. Buckton*, 1 Strange, 192; *Barnum v. Vandusen*, 16 Conn. 200; *Fultz v. Wycoff*, 25 Ind. 321; note to *Gilson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 831. The case of the sale of animals known to be diseased and of communicating their disease either to others of their species or to man is a wrong of a very aggravated character, for which the wrongdoer is answerable to the extent of all damages proximately resulting from his act: *Jeffrey v. Bigelow*, 13 Wend. 518; 28 Am. Dec. 476; *Wentz v. Morrison*, 17 Tex. 372; 67 Am. Dec. 658; *State v. Fox*, 79 Md. 514; *ante*, p. 424. One who has occupied land as the licensee of the owner and pastured thereon sheep affected with a contagious disease, and who assures the landowner, he being a person not acquainted with the nature of the disease, that there is no danger of communicating it to other animals, is answerable to such landowner for damages suffered by him by his placing his sheep upon the same land for pasturage, whereby the contagion was communicated to them: *Eaton v. Winnie*, 20 Mich. 156; 4 Am. Rep. 377. One taking animals for pasturage and placing them with other animals, known to him to be infected with a contagious disease, and which is thereby communicated from them, is answerable for the resulting damages: *Costello v. Ten Eyck*, 86 Mich. 348; 24 Am. St. Rep. 128. A like liability follows when, though the agister has no infected animals on his own premises, he knows that animals so infected are on adjoining premises, and through his negligence in not keeping in repair a fence which it is his duty to maintain, he suffers the healthy animals to escape and go upon the premises where are the diseased animals, and thereby to contract the malady from which the latter are suffering: *Sargent v. Slack*, 47 Vt. 674; 19 Am. Rep. 136. It must be remembered that in all these cases knowledge of the condition of the diseased animals was brought home to their owner; and he cannot be held answerable where this knowledge did not exist, except perhaps where its absence could coexist only with gross inattention to his business and property. Even when the right to recover is founded on a statute forbidding the driving of diseased animals through any part of the state, and declaring that any person violating the statute shall be liable to any person injured for all damages that may arise from the communication of the disease, it has generally been held that the plaintiff must fail unless the defendant knew, or by the exercise of reasonable diligence should have known, of the existence in his animals of disease or of their capacity to communicate disease to others: *Purley v. O. M. & St. P. Ry. Co.*, 90 Iowa, 146; *Pater v. Adams*, 37 Kan. 133; *Railway Co. v. Finley*, 38 Kan. 350. *Contra*, *Wilson v. Railway Co.*, 60 Mo. 184; *Surface v. Railway Co.*, 63 Mo. 452.

The Liability for Exposing a Human Being to Contagion cannot differ from that for exposing inferior animals thereto, except that the wrong is more aggravated and the damages recoverable proportionately greater in amount. Hence, an action lies against one who takes children to a boarding-house knowing them to be afflicted with whooping-cough which they communicate to other children boarding there: *Smith v. Baker*, 20 Fed. Rep. 709; or against a landlord who, knowing premises to be infected by a contagious disease, let them to a tenant ignorant of their condition in this respect: *Cesar v. Karutz*, 60 N. Y. 229; 19 Am. Rep. 164; *Minor v. Sharon*, 112 Mass. 477; 17 Am. Rep. 122; *Cutter v. Hamlen*, 147 Mass. 471; or against an innkeeper who, knowing smallpox to be in his house, kept it open for business and received therein a guest to whom the disease was communicated: *Gilbert v. Hoffman*, 66 Iowa, 205; 55 Am. Rep. 263. It is essential, however, in all actions of this character to show that the person through whose act the contagious disease was communicated knew of its existence, and, in the event of its having been communicated by a servant or agent, his principal is not answerable for damages unless such principal was also informed of the condition of his agent. Therefore, an action cannot be sustained against a railway corporation by one contracting a contagious disease from purchasing a ticket of an agent suffering from such disease, though the agent either knew, or might have known at the time, that by reason of his coming in close proximity with the plaintiff, the latter might contract and suffer from such disease. In thus deciding the court said: "It is the rule that where the owner of a house, office, or other tenement, knowing that it is so infected by the smallpox, or any other contagious disease, as to be unfit for occupation, and to endanger the health and lives of the occupants, and concealing this knowledge from the person invited, induces him to hire, occupy, or visit it, and the person so hiring or invited takes a disease by reason of the infection, the owner is guilty of actionable negligence. In such a case, however, it must be shown that the owner knew that the house, office, or tenement was so infected as to endanger the health or life of any person who might visit or occupy it. Knowledge is an element in the intent essential to liability: Bishop on Non-Contract Law, sec. 502; *Meeker v. Van Rensselaer*, 15 Wend. 397; *Minor v. Sharon*, 112 Mass. 477; 17 Am. Rep. 122; *Cesar v. Karutz*, 60 N. Y. 229; 19 Am. Rep. 164; *Smith v. Baker*, 20 Fed. Rep. 709; *Gilbert v. Hoffman*, 66 Iowa, 206; 55 Am. Rep. 263. In this case it is not charged that the railroad company or any of its superior officers knew that its agent at Anness was afflicted with any disease, contagious or otherwise. We do not think that a master or a railroad company is liable in damage to a third person because such person has contracted a contagious or infectious disease from an agent, when the master or company has no knowledge that the agent is afflicted. Proof of scienter is necessary": *Long v. Chicago etc. R. R. Co.*, 48 Kan. 28; 30 Am. St. Rep. 271.

BENTON HARBOR v. ST. JOSEPH AND BENTON HARBOR STREET RAILWAY COMPANY.

[102 MICHIGAN, 336.]

RAILWAYS.—MANDAMUS WILL NOT ISSUE TO COMPEL the doing of an act which it appears that the person against whom the writ is sought is not able to do. Hence, it will not issue to compel a street railway to pave the street between its tracks when it has no means with which to do the work and no ability to borrow.

Charles N. Sears and Thomas O'Hara, for the relator.

W. C. Hicks and M. L. Howell, for the respondent.

337 LONG, J. This is an application for mandamus to compel the respondent company to pave between its rails and tracks, and to pave twelve inches outside its tracks within a certain district in the city of Benton Harbor.

The respondent corporation was organized under the laws of this state in 1881, and in that year obtained a franchise from the village of Benton Harbor (now a city), and operated a horse railroad up to the year 1892. On April 26, 1889, the common council of the village of Benton Harbor passed an ordinance authorizing a double track in certain portions of the village, and requiring the respondent company to plank, macadamize, or gravel the space between the tracks and between the rails of each track, and to place guard planks or macadam on the outside of the outer rail of each track twelve inches in width, and to keep the whole in good repair. This ordinance was accepted by the respondent company, and it claims that it was passed with the understanding that electric ³³⁸ power might be used, but this fact does not appear in the ordinance. On June 5, 1891, the village of Benton Harbor became incorporated as a city under that name. On December 12, 1891, the respondent company petitioned the city council to pass an ordinance authorizing and permitting it to substitute and use electricity as the motive power. The council, on that same evening, passed a resolution which provided that the company be granted a franchise to operate its present system by electricity, subject to the terms and conditions of an ordinance to be approved by the city council and accepted by the company. It is claimed that on December 14th, two days afterward, the respondent company accepted this resolution or ordinance. It is claimed by the respondent company that, in accepting this ordinance

it supposed the terms to be imposed contemplated the setting of poles, the stringing of wires, etc., and never supposed that they contemplated the paving of the streets between the tracks. On December 28th, however, the council passed the ordinance, setting forth the terms and conditions upon which electricity might be used as a motive power; and, among the conditions, it was provided that the respondent should repair that portion of the streets and highways included between the rails, and not less than twelve inches outside thereof, and wherever a double track should be used that space lying between the tracks; and that, whenever any street in which tracks were laid should be paved by the city, the respondent company should pave its portion thereof as above described, with the same material, etc. On the day this ordinance was passed, the respondent company wrote the council as follows:

"Take notice that the St. Joseph & Benton Harbor Street Railway Company hereby repeats its acceptance of the ordinance granting to the street railway company consent, permission, and authority to substitute and use electricity ³⁸⁹ as a motive power upon its street railway in the city of Benton Harbor." This was signed by the president of the company.

It is contended by the respondent in the present proceeding that this acceptance had relation only to the resolution of December 12th, and was sent before the ordinance of December 28th was actually passed, and had no reference to the terms of that ordinance requiring the paving to be done; and hence the respondent never accepted the terms of the ordinance, and cannot be compelled to pave between its tracks, etc.

The answer further sets out that in May, 1892, the respondent issued its bonds, secured by mortgage on all its property, for the sum of \$150,000, with interest at 6 per cent, payable semi-annually, for the purpose of converting the road into an electric road, and for the payment of its floating debt, but that it was unable to raise sufficient money thereon, and on June 27, 1893, it gave a mortgage upon all its property for \$200,000, securing 200 bonds of \$1,000 each, bearing interest at 6 per cent per annum, payable semi-annually, for the purpose of retiring the issue of \$150,000 of May, 1892, and the payment of its indebtedness incurred in the extension and improvement of its road; that this mortgage was given to the Illinois Trust & Savings Bank of Chicago, as trustee, and

the bonds were issued and sold to bona fide purchasers, and are held principally in Boston, Massachusetts; that interest on said bonds for 1893 to the amount of \$5,000 is due and unpaid, and that interest for 1894 for the six months ending July 1st is unpaid, and that said company has lost money every year since it began to operate by electricity; that it has no credit, and is unable to borrow a dollar; that within the last six months its officers have endeavored to procure loans on the credit of the company in St. Joseph, Chicago, and Benton Harbor of banks and capitalists having money to ³⁹⁰ loan, and have been absolutely refused. A statement of the receipts and expenditures is set out, showing a deficit for 1892 of \$5,516; for 1893, a deficit of \$10,760; for the months of January to September, inclusive, of the year 1894 a deficit of \$2,846; and also showing a judgment against the company of \$1,725, in addition to taxes now accrued and unpaid—all of which shows a shortage from January 1, 1892, to October 1, 1894, of over \$20,000. Some claimed equitable defenses are also set up in the answer.

No issue is asked by the relator, and the statement of facts contained in the answer must be taken as true.

We shall not discuss or determine in this proceeding the question as to whether the ordinance of December 28, 1891, was ever accepted by the respondent company, or the claimed equitable defenses. The mandamus must be refused, however, on the second ground set forth in the answer. It appears by the answer that the officers of the company, in the financial straits in which it is placed, cannot procure funds to do the paving; that it is an utter impossibility to do what it is asked to have done; that it cannot pay the current expenses; and it is clear that a writ of mandamus will not issue to compel the performance of an act when it is apparent that the parties against whom it is to be directed have no power to comply therewith. As was said in *Silverthorne v. Warren R. R. Co.*, 33 N. J. L. 176: "Of course, it is obvious that a return which shows a legal impossibility to do what the writ directs must, in the nature of things, as a general rule, be good; and, consequently, a want of funds and an inability to procure them will, for the most part, be a legal answer to the precept of the court requiring cause shown why certain moneys should not be paid."

This rule was recognized in *Ohio etc. Ry. Co. v. People*, 120 Ill. 200. It was said: ³⁹¹ "It is an admitted fact that the road

is greatly out of repair, . . . but the answer shows that the company has neither the funds, nor the means of raising them, which are required to put the road in a safe condition. Now, while the matter thus set up in the answer no more exonerates the company from the duties which it owes the public than the inability of one to pay his honest debts would relieve him from his legal liabilities to his creditors, yet it does show a conclusive reason why mandamus is not a proper remedy in the case; for no principle of law is better settled than that the writ should not be granted in any case where it is clear that it would prove unavailing; as where the act sought to be enforced is, from its very nature, physically impossible, or where, from extrinsic causes, it has become so, or where performance, though not absolutely impossible, is from any cause not within the power of the defendant. But whatever the ground may be, whenever it is apparent that the defendant is unable to perform the act sought to be thus enforced, the writ, as a general rule, will be denied": Citing *People v. Chicago etc. R. R. Co.*, 55 Ill. 95; 8 Am. Rep. 631; *People v. Lieb*, 85 Ill. 484; *People v. Trustees of Schools*, 86 Ill. 613; *Cristman v. Peck*, 90 Ill. 150; *People v. Hatch*, 33 Ill. 9.

It was further said in that case: "If, as seems to be the case, the defendant is wholly unable to discharge the duties it owes to the public, and which the law has imposed upon it, a proceeding in the nature of a quo warranto is the proper remedy, and not mandamus": See, also, *People v. Dutchess etc. R. R. Co.*, 58 N. Y. 152; *People v. Hayt*, 66 N. Y. 606.

It is a general rule that a writ of mandamus will not issue unless it clearly appears that the person to whom it is directed has the absolute power to execute it: *Turnbull v. Giddings*, 95 Mich. 314; *Corby v. Durfee*, 96 Mich. 11; *City of Port Huron v. Jenkinson*, 77 Mich. 414; 18 Am. St. Rep. 409; Merrill on Mandamus, sec. 76.

We are satisfied, from the return made to the order to show cause, that mandamus is not the proper remedy in the present case. It is shown that it is impossible to ³⁹² borrow or otherwise raise the money to pay for the paving; and it would be futile to make the order, as the parties could not be punished for contempt in disobeying it. The city is not without its remedy, but mandamus is not the proper one.

The writ must be denied.

The other justices concurred.

MANDAMUS WILL NOT LIE WHEN OBEDIENCE IS IMPOSSIBLE: *State v. Beloit*, 21 Wis. 280; 91 Am. Dec. 474; extended note to *Dane v. Derby*, 89 Am. Dec. 731. Mandamus issues only when there is a clear and specific right to be enforced, or a duty which ought to be and can be performed, and there is no other adequate remedy: *Swift v. Richardson*, 7 Houst. 338; 40 Am. St. Rep. 127.

HANSELMAN v. DOVEL.

[102 MICHIGAN, 505.]

EVIDENCE.—IN AN ACTION FOR CRIMINAL CONVERSATION, evidence that the defendant had a conversation with the witness about the frequency of his calls upon the plaintiff's wife, and why he made them, is properly excluded if it is not proposed to show that as part of such conversation any incriminatory admissions were made.

WITNESS.—A HUSBAND, THOUGH DIVORCED FROM HIS WIFE, is not a competent witness to testify to her alleged adultery occurring during the marriage.

George L. Hilliker, for the appellant.

A. V. McAlvay and Thomas Smurthwaite, for the defendant.

505 MONTGOMERY, J. This is an action for criminal conversation. Verdict for defendant.

1. On the trial the plaintiff called a witness, one J. M. Ramsdell, who testified that during 1893 he called upon 506 plaintiff and his wife at their rooms, and between January and August of that year saw defendant there as often as once a week; that he had a conversation with defendant in regard to his calls there, once; thinks it was in the spring or early summer. He was then asked the following question:

"State who began the conversation, and what was said:

"*Mr. McAlvay.* We object to it as immaterial and irrelevant, and ask what is sought to be shown by it.

"*Mr. Hilliker.* We seek to show simply this: That Mr. Dovel came to see Mr. Ramsdell, because Mr. Ramsdell, as Mr. Dovel said, had talked with Mrs. Hanselman about the effect of his calls there, and Mr. Dovel came there, protesting as to Mr. Ramsdell's interference with his calls. They had a conversation there, in which the matter of the frequency of his calls was gone over, in which he talked about his calls there, and why he went there, and what he was doing there; and we seek to bring that out, and about these very calls he was making down at this house."

The court, after an examination of the declaration, said: "The gist of the complaint, as I understand it, is a carnal

knowledge and alienation through this, and not by other means. So I have some doubt about the relevancy of the testimony as to the frequency of the calls there, as to conversations at least, especially in advance of any evidence that frequent calls had been made. You did not expect to show, or have not offered to show, that there were any admissions made at this conversation of criminal intimacy.

"*Mr. Hilliker.* No, sir.

"*The Court.* I think I will sustain the objection to the introduction of the conversation at the present time, unless it is connected with something else to make it relevant."

The ruling simply related to the order of proof, and, as it is clear that the offered testimony would not, of itself, have been sufficient to entitle the plaintiff to claim a verdict from the jury, we think it cannot be said that the ruling was prejudicial. There was a plain intimation that, if the plaintiff were afterward able to offer testimony ⁵⁰⁷ which tended to substantiate the main charge, the testimony here offered would be admitted. This the plaintiff appears to have been unable to do, unless it shall be held that the testimony of the plaintiff himself was competent.

2. This leads us to the consideration of the most important question presented, which is whether, after a divorce between the plaintiff and his wife, the husband is a competent witness to testify to the charge of adultery in a suit brought against the alleged paramour of the wife.

3. Howell's Statutes, section 7546, provides: "A husband shall not be examined as a witness for or against his wife without her consent, nor a wife for or against her husband without his consent. . . . Nor shall either, during the marriage or afterward, without the consent of both, be examined as to any communication made by one to the other during the marriage; but, in any action or proceeding instituted by the husband or wife in consequence of adultery, the husband and wife shall not be competent to testify."

In *Mathews v. Yerez*, 48 Mich. 361, it was held that, under this statute, the wife is not a competent witness for the husband in a suit brought by him for criminal conversation. The doctrine of this case was reaffirmed in *Reynolds v. Schaffer*, 91 Mich. 494; 30 Am. St. Rep. 492.

In *Carter v. Hill*, 81 Mich. 275, it was held that the husband is not a competent witness for himself in such a case. It was said by Mr. Justice Cahill:

"This statute was intended to subserve a wise public policy; and we think we ought to call attention to the flagrant violation of it in this case, even though no point be made upon it by counsel. . . . The clear purpose of the statute is to preserve with sacredness the confidences of the marriage state, and to render it impossible for either husband or wife to speculate upon the other's dishonor, relying upon their own testimony to make or support a case."

The question remains whether, after the termination of ~~the~~ the marriage relation, it is competent for the husband to testify to the alleged fact of adultery occurring during marriage. We are cited to no case in which such testimony has been held competent.

In the case of *People v. Marble*, 38 Mich. 117, the incompetency of such testimony is implied rather than stated. In that case the witness was permitted to testify to transactions which did not consist of communications made during marriage, and it was said:

"Since the relation had ceased when he was called, and, as the prosecution 'was not in consequence of adultery,' there was nothing to qualify his general competency save the exception in the second of the above-named sections, providing that, without the consent of both, neither husband nor wife, during the marriage or afterward, shall 'be examined as to any communication made by one to the other during the marriage.'"

In the case of *State v. Jolly*, 3 Dev. & B. Eq. 110, 32 Am. Dec. 656, the question arose whether, at the common law, the divorced husband was a competent witness to testify against the paramour of the wife, and it was held that he was not. It was said in the course of the opinion:

"It is argued by the attorney general that the criminal conduct testified to in this case was itself an outrageous violation of the marriage vow—a matter in respect to which confidence was not yielded by the wife, nor could have been asked by the husband. . . . We are not satisfied that the exception contended for is established by the reasoning urged in its support. The rule we deem a valuable one, and we view with apprehension any exception having a tendency, more or less direct, to promote cunning, or to generate distrust where the best interests of society require that perfect frankness and confidence ought to prevail. If one exception be sanctioned because, from the character of the criminal

act imputed, the dissent of the witness from its commission must be presumed, others may follow where the like presumption will be entertained, although not perhaps with equal confidence, and there will be danger of our having no rule capable of general and steady application."

⁵⁰⁹ In *State v. Phelps*, 2 Tyler, 374, it was held that a woman divorced *a vinculo* is not a competent witness upon an indictment against her former husband to prove his adultery. And in *Rea v. Tucker*, 51 Ill. 110, 99 Am. Dec. 539, it was held that, in an action for criminal conversation, a divorced wife is not a competent witness to testify in behalf of her former husband, and against her alleged seducer.

There are cases in which the husband, after the divorce of the wife, has been permitted to call her to prove her own infidelity: *Ratcliff v. Wales*, 1 Hill, 63; *Dickerman v. Graves*, 6 Cush. 308; 53 Am. Dec. 41. But in each of these cases the holding was put upon the distinct ground that the wife was not called to testify against her husband; while in *Ratcliff v. Wales*, 1 Hill, 63, it was distinctly intimated that she would not be competent to testify against him. It was said: "For the purpose of promoting a perfect union of interests, and securing mutual confidence between husband and wife, the courts have generally refused to admit the wife as a witness against the husband, even after the marriage contract was at an end, when she was called to speak of any matter which happened during the continuance of the marriage, and which might affect the husband either in his pecuniary interest or character."

In the present case the testimony of the husband would affect the character of the wife, is offered in an action instituted by him in consequence of adultery, and we think is within the prohibition of the statute.

The judgment will be affirmed, with costs.

McGRATH, C. J., LONG and HOOKER, JJ., concurred.

GRANT, J., did not sit. —

WITNESSES — HUSBAND AND WIFE — ADULTERY.—The husband of a woman with whom the crime of adultery is alleged to have been committed is not a competent witness to prove the offense: *State v. Welch*, 26 Me. 30; 45 Am. Dec. 94, and note; *State v. Jolly*, 3 Dev. & B. 110; 32 Am. Dec. 656, and note. On the trial of an indictment for adultery, the husband of the *particeps criminis* is a competent witness to prove circumstances which do not directly, but tend to, criminate her: *State v. Bridgman*, 49 Vt. 202; 24 Am. Rep. 124. Under a statute permitting husband and wife to testify

against one another on a criminal prosecution for an offense committed by one against the other, the one may testify against the other for adultery: *Roland v. State*, 9 Tex. Ct. App. 277; 35 Am. Rep. 743, and note; *De Meli v. De Meli*, 120 N. Y. 485; 17 Am. St. Rep. 652. A divorced wife is a competent witness in an action for criminal conversation, brought by her husband to prove criminal intercourse with her during marriage: *Dickerman v. Graves*, 6 Cush. 308; 53 Am. Dec. 41, and note. See, also, the notes to *Rea v. Tucker*, 99 Am. Dec. 541, and *Commonwealth v. Sapp*, 29 Am. St. Rep. 411.

KEHL v. DUNN.

[102 MICHIGAN, 581.]

EXECUTIONS — EXEMPTION.—A PIANO IS NOT EXEMPT FROM EXECUTION UNDER a statute exempting to each householder the household goods, furniture, and utensils, not exceeding in value two hundred and fifty dollars, though its value is not in excess of that sum.

Chadbourne & Rees, for the appellant.

A. R. Gray, for the plaintiff.

581 LONG, J. This cause was tried before the court without a jury upon the following agreed facts: Plaintiff was the owner and in possession of a piano of the value of two hundred dollars. 582 The defendant, as sheriff, levied an execution in favor of Simon Karger upon the piano and other property belonging to plaintiff, and presented a list of the property so levied upon to the plaintiff, who then and there selected the piano as his exemption, under subdivision 7 of section 7686 of Howell's Statutes. At the time of the levy, plaintiff was a householder, living in Houghton with his family, consisting of himself and wife and four children, all sons, aged respectively 15, 13, 12, and 8 years. The piano was, and had been for two years prior to the levy, kept in the house of plaintiff, and used for the instruction of his children in music. Plaintiff demanded possession of the piano, which was refused, and this action of replevin was brought by him and the piano taken on the writ. On the trial the court found the title in plaintiff, and awarded him judgment for costs.

The only question in the case is whether, under the provisions of the statute above cited, this piano is exempt. This subdivision exempts "to each householder all household goods, furniture, and utensils, not exceeding in value two hundred and fifty dollars." Counsel for plaintiff has pre-

sented a brief and argument in the case to sustain this judgment that is certainly very ingenious, but no case is cited, under a statute like ours, which upholds his contention. While these statutes are construed with great liberality in favor of exemptions, yet we think the language employed in subdivision 7 is not open to a construction which would exempt a piano. A piano cannot be classed as household goods, furniture, or utensils, within the meaning of the statute. The court below was in error in holding it exempt: See *Tanner v. Billings*, 18 Wis. 163; 86 Am. Dec. 755; *Dunlap v. Edgerton*, 30 Vt. 224.

Judgment reversed, and judgment entered here for defendant.

The other justices concurred.

EXECUTIONS—EXEMPTION—PIANOS.—The term "all household and kitchen furniture" may include a piano kept and used for the purpose of instructing children of the family in music if the statute places no limit on the value of the household and kitchen furniture which it declares shall be exempt: *Alsip v. Jordan*, 69 Tex. 300; 5 Am. St. Rep. 53, and note. See, also, the extended notes to *Rockwell v. Hubbell*, 45 Am. Dec. 255, and *Sumner v. Blakslee*, 47 Am. Rep. 197.

BROCK v. DWELLING HOUSE INSURANCE COMPANY.

[102 MICHIGAN, 583.]

INSURANCE—APPRAISEMENT OF AMOUNT OF LOSS.—If an insurance corporation selects an appraiser who resides one hundred and thirty-five miles distant from the place of the loss, and he, because of his want of acquaintance with that locality, refuses to join in the selection of any umpire other than persons living in other distant parts of the state, though furnished with a list of twelve persons acceptable to the assured residing in the town in which the property destroyed was situate, this is equivalent to a refusal by the insurer to proceed with the appraisement, and entitles the assured to maintain an action as if the appraisement had been waived.

Shepard & Lyon, for the appellant.

Pratt, Van Kleeck & Gilbert, for the plaintiff.

584 McGRATH, C. J. The policy upon which suit is brought contains the following provisions:

"This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction

for depreciation, however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality. Said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all or any part of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time, on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described.

“In the event of disagreement as to the amount of loss, the same shall, as above provided, be ascertained by two ~~585~~ competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire. The appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall be prima facie evidence of the amount of such loss. The parties thereto shall pay the appraiser respectively selected by them, and shall bear equally the expenses of the appraisal and umpire.

“This company shall not be held to have waived any provision or condition of this policy, or any forfeiture thereof, by any requirement, act, or proceeding on its part relating to the appraisal, or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

“No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing

requirements, nor unless commenced within twelve months next after the fire."

The property insured consisted of a dwelling-house. The loss occurred July 25, 1892. After the fire, the company's agent visited the locality, and had a conversation relative to the loss. An offer was made by the agent, which, in view of the subsequent correspondence, must be regarded as an offer of compromise, rather than an acknowledgment of liability on the part of the company, or an estimate of the amount of the loss. At this interview a proposition was made to have an appraisal, but the company's agent said that he did not propose or did not care to arbitrate the matter.

On August 16, 1892, the company wrote to plaintiff as follows: "On the 6th inst., instead of receiving a call from you, I had one from Mr. Van Kleeck, who said he was your ~~586~~ attorney in the matter of your claim under policy 731,375. That there be no misunderstanding in this matter, I would remind you that in my conversation with you I did not state what position the company would take in the matter, and did neither admit nor deny liability on the part of the company in your favor. Neither did I in my conversation with Mr. Van Kleeck admit or deny such liability. Reserving to the company all its rights under the policy, I remain."

Again, on August 30th, the company wrote: "Yours of the 17th inst. at hand, inclosing affidavit of David Brock in re claim under policy 731,375. Whether the policy was valid or void at the time of the fire, I do not wish to be understood as expressing any opinion, either directly or by implication. In case of a policy void at time of the fire, no form of affidavit, however fully it might set forth the facts, would be operative to inject validity into the claim; whereas, if it were valid at time of fire, an affidavit in manner and form like the one referred to would not be a compliance with the requirements of the policy, to which I refer you. As this affidavit, therefore, could in neither contingency have any force or effect, I return the same without either demanding or waiving full compliance on the part of the insured with the requirements of the policy."

"Neither admitting nor denying liability on the part of the company, nor waiving or extending any of the terms, provisions, conditions, or requirements of the policy, I remain."

On September 1, 1892, plaintiff sent on proofs of loss, and in the letter suggested an appraisal of the property. On

September 9th plaintiff wrote again, asking for a reply to the letter of the 1st. On September 12th defendant wrote as follows: "I would say that the company is willing to have the value of the building at the time of the fire appraised, as per the terms of the policy, with the understanding that in so doing it reserves all its rights in the matter, and that nothing so far done is to be construed as a waiver of its rights under the policy, nor an acknowledgment of any liability on its part in favor of Mr. Brock."

587 On September 13th plaintiff replied, naming one Callender as appraiser. On September 16th defendant wrote, objecting to Callender, and saying: "If you want an appraisal, you must, in accordance with the policy, select a competent and disinterested man."

On January 12, 1893, plaintiff wrote as follows: "Messrs. Shepard & Lyon, on inquiry from them yesterday, say that they have done all in the insurance matter of David Brock's claim under policy 731,375 against your company that they are authorized to do. We have furnished all information we have in regard to the loss. Mr. Brock has presented himself for examination under oath, at your request. It seems to us that the only thing necessary to make this matter complete is for you to send us draft and take up your policy. As to the matter of appraisal suggested to you in ours of September 13th, we desire to say that, so far as Brock is concerned, he has no desire to insist or oppose an appraisal. We have waited since that date for you to act in that matter if you desire so to do. We now say, as we understand the matter, Brock is entitled to his money, and if we do not hear from you at once, with draft inclosed, we shall conclude that you are in possession of some fact which you conclude is a complete bar to his right to make such claim. As to such matters, if any, others than us must decide."

In reply defendant wrote: "I would say that an appraisal was demanded by Mr. Brock, agreed to by the company, with the understanding that it would not in any event prejudice its rights under the policy, and should not be a waiver of any of the conditions of the policy, or of a forfeiture thereof (see the conditions of the policy, lines 92 and 93, Mich. Stand., cited in a former letter to you), and we have for some time been waiting for Mr. Brock to name an appraiser—some person possessing the attributes required of him by the policy. We are still waiting for Mr. Brock to name his appraiser, and

prefer that he abide by his election to submit the matter to appraisal, as provided by the policy."

On January 18, 1893, plaintiff wrote nominating one ⁵⁸⁸ Huntley as appraiser, and on January 24th defendant wrote nominating one Hilton, an insurance adjuster residing at Grand Rapids. On February 1st plaintiff wrote as follows: "Pursuant to your letter of January 24, '93, Mr. Charles A. Hilton came here on the 27th of January, and he, together with Mr. Huntley, signed a declaration to appraise the property insured under the Brock policy. They then endeavored to agree upon an umpire. We understand that Mr. Hilton objected to any person from this county to act as such umpire. At any rate, they were unable to agree on one, and did nothing on that day. Mr. Hilton went away, saying he would return January 31st, and complete the matter. Mr. Huntley came that day and waited the whole of the day for Mr. Hilton, and again to-day. Your Mr. Hilton has not appeared, and no word has been received from him in regard to the matter at all. We therefore conclude you have determined to abandon the matter of appraisal. We shall therefore expect a decided answer whether you now propose to pay the claim made under the policy."

On February 3d defendant wrote that the general agent was out of the city, but that Hilton had been communicated with. On February 5th Hilton wrote Huntley, submitting the names of three persons, one a resident of Grand Rapids, another of Lansing, and one Patzer, of Saginaw. Huntley replied, submitting the names of twelve residents of Bay City, and saying: "I don't think it necessary to go outside of Bay City in order to find an impartial and honest contractor and builder to act as umpire in case we don't agree, and take the liberty of sending you this list to choose from. Any one of them will be acceptable to me. The most of them are strangers to me, being known only by sight and reputation. I am willing to throw out those that are acquainted with me or acquainted with the facts in any way, and send you list hoping you will find some one who will be acceptable to us both."

On February 11th Hilton wrote Huntley as follows: "I do not question the honesty, ability, or integrity of ⁵⁸⁹ any contractor in Bay City, but, not being acquainted with any of them, I consider the chances of getting one that would be partial in his ruling and decisions. I do not care to take the chances, and cannot consent to the selection of an umpire

from Bay City or West Bay City. We certainly ought to be able to find some one outside that would be satisfactory to both of us. When we can agree upon such an one, I am ready to proceed. If you cannot accept any one of the names that I proposed, you can make a list of from three to six names, selected from different localities, and submit to me, and I will see if there is not some one of them that I can accept."

Huntley replied as follows: "Not being acquainted with the gentlemen you name in yours of February 5, or their business standing, I don't care to take the chances; and knowing by reputation the names on the list I sent you on February 7, I think a judicious selection can be made from them."

Nothing further was done, and on February 16, 1893, suit was commenced. On February 11th, defendant's general agent wrote, alleging his absence from the city when plaintiff's letter of the 1st was received, and saying: "I write Mr. Hilton to-night inquiring as to his version of the story. My impression is that you would like to deprive us of the privilege of a fair appraisal under the policy by refusing to agree to any fair proposition that might emanate from Mr. Hilton, but I mean that, if we have any rights under the policy, they shall be maintained. You will bear in mind that the demand for appraisal came originally from you."

To the declaration herein, defendant pleaded the general issue with notice that upon the trial it would insist in its defense that plaintiff had failed to comply with the terms of the policy, and that said policy was inoperative and void, and the defendant released from all liability thereunder, for the following reasons:

"1. That the plaintiff was not the sole and unconditional owner of the property insured, free from all liens ⁵⁹⁰ whatever, but that one William Brock had an interest and ownership in said property as well as said plaintiff at and previous to the time of said fire, whereby said policy became void.

"2. This defendant will show that the said policy became inoperative and void, and that plaintiff is not entitled to maintain action or suit upon said policy, for the reason that there was a disagreement as to the amount of loss under said policy, and the amount of said loss is required by the terms of said policy to be ascertained by two competent and disinterested appraisers, and because the amount of the loss has

not been so estimated or appraised, and no award has been made by any arbitrators as to the amount of such loss, and therefore the plaintiff is not entitled to maintain this action for loss under said policy.

"3. Because this defendant has sixty days after such appraisal and adjustment of loss under said policy in which to pay the same, and that such term of sixty days has not yet elapsed since any appraisal and adjustment of the amount of said loss has been had."

At the close of the proofs, defendant's counsel requested the court to instruct the jury that plaintiff had not established title to the property; that the policy appeared to have been transferred to plaintiff, whereas the conveyance was made to William and David Brock, and thereafter William conveyed to David, a notation of which did not follow on the policy, and a knowledge thereof was not brought home to the defendant; and that, inasmuch as arbitration proceedings had been agreed upon and were pending, and arbitrators were, on the day that the suit was brought, negotiating with reference to the selection of an umpire, the action was prematurely brought, and plaintiff could not recover. The court, however, instructed the jury that:

"An agreement to arbitrate prevents the commencement of suit while the agreement is in force, and the parties are actually acting under it. An agreement to arbitrate will take a suit already pending out of court, but, if they fail to act on it, still the suit may be maintained. In this ⁵⁹¹ case the policy provides that the insured shall select one man and the company select another man, and that they two shall pick a competent, disinterested party for an umpire. You have heard what the letters say in regard to that subject, and you have heard the testimony of the witnesses. Now, in order to have an arbitration of any effect, both parties must conduct themselves with absolute fairness. You have heard the negotiations between the two arbitrators, and that they did not agree. Unless an arbitration has gone farther than merely the appointing of the two men, and their efforts to agree upon a third party, after the lapse of time that elapsed after this fire, and before the commencement of this suit, I charge you that the clause for an arbitration is not a bar to this action."

The provisions of this policy are evidently intended to enable the parties thereto to agree between themselves as to the

amount of the loss, and, in the event of a failure to agree, to submit the same to arbitration. After proofs of loss have been made, it is clearly the duty of the company, within a reasonable time, to make manifest its disagreement with the amount claimed by such proofs. The policy expressly provides that:

“The loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers, when appraisal has been required.”

This provision makes such appraisal, “when required,” a condition precedent to the right to sue. The defendant has a reasonable time within the sixty days after proofs of loss have been furnished within which to move with respect to the ascertainment or estimate of the loss. Had the time elapsed and no move been made in that direction, the plaintiff would undoubtedly have had the right to bring suit. In the present case, however, plaintiff, with his proofs of loss, and without waiting for any action by the company, prompted undoubtedly by what had occurred between the parties before proofs of loss had been furnished, ⁵⁹² asked for the appointment of appraisers, and they were appointed. The plaintiff cannot now be heard to say that, inasmuch as no effort had been made by the parties looking to an adjustment, the appointment of appraisers was premature. An appraisal must be regarded as having been required within the language of the policy.

Another question, however, presents itself. The terms of the policy do not contemplate, in case of a disagreement between the parties, that partisans shall then be appointed as appraisers. It is contemplated that the two appraisers appointed may agree, but the parties themselves are as likely to agree as two persons selected because of individual bias. As is said in *Bradshaw v. Agricultural Ins. Co.*, 137 N. Y. 137, the term “disinterested” does not mean simply lack of pecuniary interest, but requires the appraiser to be one not biased or prejudiced. The defendant selected as its appraiser an insurance adjuster residing at Grand Rapids, a point one hundred and thirty-five miles distant from the place where the fire occurred. The two disagreed as to the selection of an umpire. Defendant’s appraiser then suggested the names of three persons, one of whom resided in Grand Rapids, another

at Lansing, and the third at Saginaw. The agreement does not contemplate that the umpire shall be selected at random, or without some knowledge on the part of both appraisers as to his competency and fitness. Parties living in the locality would naturally be best qualified to pass upon the question of values, and an appraiser would not be under obligation to make trips to other localities than that of the fire to ascertain as to the propriety of appointing the person suggested as an umpire. The agreement contemplates an inexpensive method of settlement. Strangers to the locality are not usually selected as appraisers, and in case of the inability of the appraisers to agree, a third party, known to both, and in whom both have confidence, is supposed ⁵⁹³ to be selected. An investigation as to the parties named by defendant's appraiser would have been productive of expense and delay. The fact that defendant selected a person who resided one hundred and thirty-five miles distant, and who, for that reason, was unacquainted with the residents of the locality of the loss, and was not competent to judge of their fitness, does not affect the reasonableness of the rule, and did not impose the duty of travel and investigation upon the appraiser appointed by plaintiff. The facts are not disputed. Defendant's appraiser insisted upon the appointment of a person with whom he was presumably acquainted, who was a stranger to the locality and to plaintiff's appraiser. The latter offered the names of twelve residents of the locality from which the jury, in case of suit, would be drawn. No valid reason is assigned for a refusal to accept one of the twelve, and the only reason given is that he did not care to take the chances of getting one that would be partial. The requirement that plaintiff's appraiser should go into other portions of the state to make inquiry as to the fitness of the persons named was not a reasonable one. The suggestion that some one be selected from the locality of the fire was not unreasonable. It is well settled that where the conduct of the company's appraiser in refusing to agree on an umpire is inexcusable, and virtually amounts to a refusal to proceed with the appraisement, the fact that the appraisement was not concluded before suit brought will not bar an action on the policy: *McCullough v. Phoenix Ins. Co.*, 113 Mo. 606; *Bishop v. Agricultural Ins. Co.*, 130 N. Y. 488; *Uhrig v. Williamsburgh etc. Ins. Co.*, 101 N. Y. 362; *Bradshaw v. Agricultural Ins. Co.*, 137 N. Y. 137. In the *McCullough* case the court say:

"The appraisers could not agree as to the value of the property destroyed or the amount of damages sustained, nor could they agree on the third man. McGraw then ⁵⁹⁴ suggested the names of four or five persons, some of whom resided in the county, some at Boonville, and some at other points not far distant. White would not agree to either of them, and suggested the names of some others, living in St. Joseph, Kansas City, and St. Louis, at least two hundred miles distant from where the fire occurred. McGraw would not agree to any of the persons suggested by White. White then left for Louisville, Kentucky, and did not return again. McGraw's objection to the persons suggested by White was because of the remoteness at which they resided from the place of the fire, and their want of knowledge of the value of the property in that locality, but White would not agree to any other person. His testimony was not taken in this case, nor is there any excuse offered for his refusal to accept some one of the persons as umpire that were suggested by McGraw. His course, under the circumstances, to say the least of it, is not to be commended, was unreasonable, unjust, and tantamount to a refusal to proceed with the appraisement. Justice and fair dealing did not require the plaintiffs to wait longer than they did before instituting their suit."

The judgment is therefore affirmed.

The other justices concurred.

INSURANCE—APPRAISEMENT OF AMOUNT OF LOSS.—If an appraiser chosen by an insurer acts as though he was the agent of the insurer, and refuses to agree to a disinterested umpire, or otherwise prevents the appointment of such umpire, the insured is entitled to maintain an action upon his policy without obtaining an award fixing the amount of his loss: *Niagara etc. Ins. Co. v. Bishop*, 154 Ill. 9; 45 Am. St. Rep. 105, and note.

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

**MINNEAPOLIS THRESHING MACHINE COMPANY v.
FIREMEN'S INSURANCE COMPANY OF CHICAGO.**

[57 MINNESOTA, 35.]

INSURANCE.—AN AMBIGUOUS EXPRESSION in a policy of fire insurance must be construed against the insurer and favorably to the insured.

INSURANCE—CONSTRUCTION OF PHRASE, "WHILE NOT IN USE."—Property consisting of a threshing-machine, engine and separator, insured against loss by fire "while not in use," is not "in use" where it has not been used for threshing for two weeks, is hauled into the country, and is left standing in readiness for use a few days later. Therefore, if the separator while thus standing is destroyed by fire, not caused by any hazard incident to the actual use or operation of either the engine or separator, the insurer is liable.

APPEAL by the defendant insurance company from an order denying its motion for a new trial.

C. M. Hertig and R. A. Daly, for the appellant.

James O. Pierce, for the respondent.

35 MITCHELL, J. On October 8, 1891, the defendant issued to one Foss its policy of insurance for one year against loss by fire on his threshing-machine, engine and separator, "while not in use"; loss, if any, payable to the plaintiff, as its interest might appear. The separator was destroyed by fire on October 1, 1892, and really the only question in the case is whether the property was "in use," within the meaning of the policy at the time of the loss.

The engine and separator had been used in threshing in the early **36** part of September, 1892, but had not been so used for two weeks prior to the date of the fire, having been

taken and kept during that time in the village of Medalia, for the purposes of repairs. On October 1, 1892, the engine was fired up and used as a traction-engine in hauling the separator seven miles out in the country, preparatory to the intended use, two days later, of both engine and separator in threshing. The property was left standing about ten rods from a farmhouse and some fifteen rods from the stacks of grain which it was intended to thresh. The fire in the engine was extinguished. During the succeeding night, while the property was standing there, the separator was destroyed by fire. The origin of the fire is unknown, but it is supposed to have been incendiary.

It is evident that the fire was not occasioned by any use of either the separator or the engine, and was not due to any risk incident to their actual use in the operation of threshing or otherwise. The most obvious and natural meaning of the words "in use," as applied to this property, is use in the business or work for which it was designed, to wit, threshing; and evidently the object of the limitation of the risk contained in the policy was to exclude any possible liability on part of the insurer for losses by fire so peculiarly liable to occur during the actual operation of steam threshing-machines.

We do not think that the separator was "in use," within the terms of the policy, when the loss occurred. The most that can be claimed is, that the expression is ambiguous, and in such case the rule is well settled that such ambiguity must be construed against the insurer, and favorably to the insured. If the defendant desired to limit the risk to the property while "in store," or to exclude from the risk all losses during "the threshing season," it would have been very easy to have said so in plain and unmistakable language.

There was a provision in the policy that it should be void "if the hazard be increased by any means within the control or knowledge of the insured," and it is claimed that under this provision the policy was entirely avoided by reason of the use of the property for threshing in the month of September. There is no merit whatever in this point.

²⁷ To say nothing of the fact that no such defense was pleaded, this provision is not to be construed so broadly as to include hazards incident to a reasonable use of the insured property, having regard to its nature and circumstances. The insurance, unless the terms of the policy

forbid, must be presumed to be made with reference to the character of the property insured and to the owner's use of it in the ordinary way. While it is true that the risk only covered the property while not in use, yet the policy nowhere forbade its use, or provided that the policy should become entirely void if it was used.

Order affirmed.

INSURANCE.—ALL AMBIGUITIES in contracts of insurance are resolved against the insurer and in favor of the insured: *Rankin v. Amazon Ins. Co.*, 89 Cal. 203; 23 Am. St. Rep. 460, and note; note to *State Ins. Co. v. Meeman*, 26 Am. St. Rep. 876.

INSURANCE—CONSTRUCTION OF POLICY AS TO PROPERTY.—It is an elementary rule that the language of a policy of insurance must be construed with reference to the nature of the property to which it is applied, the purposes for which such property is ordinarily used, and the manner in which it is usually kept: See monographic note to *Moore v. Phoenix Ins. Co.*, 10 Am. St. Rep. 390.

PIONEER FUEL COMPANY v. HAGER.

[57 MINNESOTA, 76.]

PLEADING.—A COMPLAINT FOR GOODS SOLD AND DELIVERED does not state facts sufficient to constitute a cause of action if it merely alleges that the defendant is indebted to the plaintiff in a sum named upon an account for goods sold and delivered to him at his request, and omits to state that the goods were sold by the plaintiff to the defendant.

Kueffner, Fauntleroy & Searles, for the appellant.

Jones & McMurrin and Lewis E. Jones, for the respondent.

76 CANTY, J. The complaint in this action alleges "that defendant is indebted to the plaintiff in the sum of three hundred and twenty-one dollars and twenty-three cents upon an account 77 for goods sold and delivered to him at his instance and request" between certain dates. The defendant demurred on the ground that complaint stated no cause of action. The court below overruled the demurrer, and defendant appealed.

This is an attempt to plead in the common-law form of *indebitatus assumpsit*, but the common-law form required the declaration to state that the defendant is indebted to plaintiff in a sum named for goods sold by the plaintiff to the defendant. This complaint does not allege that the goods were sold by the plaintiff, and such defect was fatal at common law: *Chitty on Pleading*, 33, note c, 16th Am. ed., and

Fenton v. Ellis, 6 Taunt. 192, cited therein. See, also, *Cathrow v. Hagger*, 8 East, 106. It is true that these were cases where the defect was in the affidavit for the arrest of the defendant, but the principle is the same, and Chitty so regards in citing them as authority as to the effect of a similar defect in the declaration.

"In assumpsit or covenant for the payment of money the defendant may be arrested as a matter of course on an affidavit shortly stating the cause of action": 1 Tidd's Practice, 171. The learned court below states in his memorandum that this complaint is exactly similar to that in *Abadie v. Carrillo*, 32 Cal. 172, which was referred to as authority by this court in *Solomon v. Vinson*, 31 Minn. 205. In this he is mistaken, and has undoubtedly been misled by the syllabus in the California case, but the statement of the case shows that the complaint was according to the common-law form.

We are of the opinion that the courts in the code states have sacrificed the principles of code pleading more than they ought to have done in adopting this common-law formula at all, and that we should not outdo the common law itself by reducing the formula still more, and making it still more in conflict with code principles. The complaint must, at least, be sufficient at common law, which it is not.

The order appealed from is reversed.

BUCK, J., absent, took no part.

ASSUMPSIT—PLEADING—GOODS SOLD AND DELIVERED.—A complaint for goods sold which avers that the defendant is indebted to the plaintiff in a certain sum for goods sold and delivered to him at his request, and that defendant has not paid the same, states a good cause of action, although it does not aver a promise to pay or state the value of the goods: *Allen v. Patterson*, 7 N. Y. 476; 57 Am. Dec. 542; note to *Wilkins v. Stidger*, 83 Am. Dec. 69; *Solomon v. Vinson*, 31 Minn. 205. A complaint in an action for goods sold, substantially in the old form of a declaration in indebitatus assumpsit, is good under the code, though the same strictness in stating the facts constituting the cause of action that was exacted by the former system of pleading is not required under the code: Monographic note to *Allen v. Patterson*, 57 Am. Dec. 546, 550, on how far the common counts are allowable under the code system of pleading.

ST. PAUL AND MINNEAPOLIS TRUST CO. v. LECK.

[57 MINNESOTA, 87.]

SETOFF—INSOLVENCY AS EQUITABLE GROUND FOR. — The insolvency of a party is a distinct equitable ground for setoff against him, and this equitable right of the debtor cannot be taken away by the insolvent's assignment for the benefit of creditors.

ACTION on a promissory note. On February 9, 1893, one George McLeod deposited with the Farmers and Merchants' State Bank of Minneapolis five hundred and thirty dollars, and took therefor its certificate. The bank agreed in such certificate to repay the money to McLeod's order in twelve months, with six per cent interest. Prior to April 1, 1893, George McLeod sold and indorsed this certificate to the defendant Angus McLeod. On April 29, 1893, Angus McLeod made his promissory note to Leck & McLeod for six hundred dollars and interest at ten per cent a year, due sixty days thereafter. It was indorsed by that firm and on that day discounted by the bank. On June 20, 1893, the bank, being insolvent, made an assignment of its property to the plaintiff, the St. Paul and Minneapolis Trust Company, in trust for its creditors. The plaintiff brought this action on July 25, 1893, against the maker and indorser. They answered, alleging that the defendant Angus McLeod held and owned the certificate of deposit; that the bank was utterly insolvent, and that its assets were not sufficient to pay five per cent of its debts. They prayed that the amount of the certificate with accrued interest, although not due, be setoff against the note. The plaintiff demurred on the ground that the answer did not state facts sufficient to constitute a counterclaim or defense. The demurrer was sustained and the defendants, James Leck and Angus McLeod, appealed from the order sustaining the demurrer.

Gilfillan, Belden & Willard, for the appellants.

H. D. Stocker, for the respondent.

¶ **COLLINS, J.** An examination of the adjudicated cases on the question now before us will disclose that the positions assumed by the counsel for the respective parties to this controversy are well supported by the authorities, and that any attempt to reconcile the squarely conflicting views found in the many opinions would prove futile. Evidently it has been regarded as an open question in this state, although the

principle involved has received some attention in *Balch v. Wilson*, 25 Minn. 299; 33 Am. Rep. 467; *Tripp v. Northwestern Nat. Bank*, 45 Minn. 383; and recently in *Laybourn v. Seymour*, 53 Minn. 105; 39 Am. St. Rep. 579.

That the insolvency of a party against whom a setoff is claimed is a sufficient ground for the exercise of the jurisdiction of a court of equity in allowing a setoff in cases not provided for by law, or, in other words, that insolvency has long been recognized as a distinct equitable ground for setoff, cannot well be disputed. Some of the cases supporting this doctrine are cited in *Waterman on Setoff*, sections 431, 432. See, also, *Kentucky Flour Co. v. Merchants' Nat. Bank*, 90 Ky. 225, and cases hereinafter mentioned. From these authorities there can be little or no controversy over the proposition that had the bank itself while insolvent, and prior to an assignment, brought an action upon the note in question, defendant McLeod could have invoked the power of the court in his behalf, and could have been allowed to interpose his equitable setoff arising out of the certificate of deposit, although it had not then matured. So that the prominent inquiry now is whether this equitable power of the court was impaired by the assignment to plaintiff under the statute of 1881 a few days before the note became due and several months prior to the maturity of the certificate.

Upon principle, it is difficult to see why a setoff which a debtor might have utilized in an action brought against him by an insolvent creditor cannot be made available when the action is brought by an assignee. To determine that it cannot, it must be held, contrary to the general rule, that, by reason of the assignment, the relations between the parties have been radically changed. Just how this change is brought about is not clearly pointed out in any of the cases cited by respondent's counsel, although it is said in the case mainly relied upon—*Fera v. Wickham*, 93 135 N. Y. 223—that, before the assignment, an equitable adjustment by setoff may be made without interfering with the equities of others, while immediately upon the passing of the estate to an assignee the formerly existing and natural equity disappears in superior equities resting in the general body of creditors; the latter are then interested, says the court, in having equality of distribution.

In line with this reasoning, the counsel for respondent in the case at bar argues that, if the defendant McLeod can be

allowed to set off the certificate to the amount of his note, he thereby gains the preference over other creditors forbidden by our insolvency law. One answer to this line of argument is that, whenever a debtor is insolvent, all of his creditors are interested in the equality of distribution referred to. The interest in having the estate of an insolvent ratably distributed among all of his creditors arises out of the fact of his insolvency, and not by the assignment. If the general body have superior equities as to the property and its distribution over the equitable rights of one of their number, they must antedate and have become vested before the assignment.

It seems to us that any line of reasoning based upon the proposition that these superior equities are not brought into existence until the assignment is made, and then suddenly come to life, while at the same time, all as if by the wand of the magician, the former and natural equity of the single creditor as suddenly disappears, is unsound. We are convinced that the better rule is that an equitable setoff which the debtor of an insolvent has at the time the latter stops payment is not affected or altered by an assignment. This statement is well supported by authorities, some from jurisdictions governed by statutory provisions similar to our own: *Schuler v. Israel*, 120 U. S. 506; *Carr v. Hamilton*, 129 U. S. 252; *Scott v. Armstrong*, 146 U. S. 499; *Merwin v. Austin*, 58 Conn. 22; *Wagoner v. Paterson Gas Light Co.*, 23 N. J. L. 283; *Nashville Trust Co. v. Fourth Nat. Bank*, 91 Tenn. 336; *Barbour v. National Exch. Bank*, 50 Ohio St. 90.

The defendant McLeod being the principal debtor, and Leck an indorser simply, the setoff can be allowed, although McLeod alone ⁹³ owned the certificate: *Becker v. Northway*, 44 Minn. 61; 20 Am. St. Rep. 543.

Order reversed.

BUCK, J., absent, sick, took no part in this case.

SETOFF AFTER INSOLVENCY—GENERAL PRINCIPLES GOVERNING EQUITABLE SETOFF.—Courts of chancery exercised a jurisdiction upon the subject of setoff before the statute of setoff existed. The English statutes of setoff were passed mainly to obviate the necessity of a resort to chancery in every case of mutual independent claims upon both sides: *Blake v. Langdon*, 19 Vt. 485; 47 Am. Dec. 701. The right to a setoff in chancery, therefore, exists independently of statute, and is controlled only by the general principles of equity: *Jeffries v. Evans*, 6 B. Mon. 119; 43 Am. Dec. 158. Courts of equity, however, in matters of setoff, follow the courts of law, except where there is some equitable ground growing out of the transaction or the

relation of the parties, which brings the case within the general jurisdiction of a court of equity, and justifies granting the relief beyond the rule of law. Equity will not enlarge the right of setoff at law, unless, by agreement or otherwise, an equity or lien exists: *Abbott v. Foote*, 146 Mass. 333; 4 Am. St. Rep. 314. In some jurisdictions setoff in equity is governed by the same principles as at law: *Jennings v. Webster*, 8 Paige, 503; 35 Am. Dec. 722; but a court of equity will not allow a setoff where a court of law would not, unless there exist special equities growing out of the transaction itself which require it: *Lockwood v. Beckwith*, 6 Mich. 168; 72 Am. Dec. 69. Courts of equity will, under circumstances of peculiar equity, entertain a bill for an offset, and liquidate the matter, or allow the party to proceed at law and obtain a liquidation, and then decree an offset: *Smith v. Wainwright*, 24 Vt. 97, 105; but a party seeking to establish a right of setoff in equity beyond that given by the statute of setoff must affirmatively show the existence of those facts necessary to raise the equity: *Lockwood v. Beckwith*, 6 Mich. 168; 72 Am. Dec. 69. Equity will extend the doctrine of setoff beyond the law in all cases where peculiar equities intervene between the parties: *Ferris v. Burton*, 1 Vt. 439; *Foot v. Ketchum*, 15 Vt. 258; 40 Am. Dec. 678; *Lee v. Lee*, 31 Ga. 26; 76 Am. Dec. 681; but it will not extend it to a case positively prohibited by the law: *Duncan v. Magette*, 25 Tex. 245. There must be a connection between the demands or some extraneous circumstance to authorize a setoff in equity: *Robbins v. Holley*, 1 T. B. Mon. 191.

INSOLVENCY AS GROUND FOR EQUITABLE RELIEF.—Where debts are not mutual, insolvency alone has been held insufficient, even in a case of positive indebtedness, to authorize an equitable setoff: *Lockwood v. Beckwith*, 6 Mich. 169; 72 Am. Dec. 69; *Hale v. Holmes*, 8 Mich. 37; *Watts v. Sayre*, 76 Ala. 397, but the adjustment of demands by counterclaim or setoff rather than by independent suit is favored and encouraged by the law, to avoid circuity of action. Hence, the insolvency of the party against whom a setoff is claimed is a sufficient ground for equitable interference: *North Chicago Rolling Mill Co. v. St. Louis etc. Steel Co.*, 152 U. S. 596; *Scott v. Armstrong*, 146 U. S. 499; *Robbins v. Holley*, 1 T. B. Mon. 191; *Nashville Trust Co. v. Bank*, 91 Tenn. 336, 347; *Laybourn v. Seymour*, 53 Minn. 105; 39 Am. St. Rep. 579; *Bemis v. Smith*, 10 Met. 194; *Marshall v. Cooper*, 43 Md. 46; *Levy v. Steinbach*, 43 Md. 212; *Fidelity etc. Co. v. Haines*, 78 Md. 454; *Becker v. Northway*, 44 Minn. 61; 20 Am. St. Rep. 543; *White v. Wiggins*, 32 Ala. 424; *Farris v. Houston*, 79 Ala. 250; *Coffin v. McLean*, 80 N. Y. 560; *Davidson v. Alfaro*, 80 N. Y. 660; *Ainslie v. Boynton*, 2 Barb. 258; *Lindsay v. Jackson*, 2 Paige, 581; *Conroy v. Dunlap*, 104 Cal. 133. Nonresidence of the party against whom setoff is prayed is also ground therefor in some jurisdictions: *North Chicago Rolling Mill Co. v. St. Louis etc. Steel Co.*, 152 U. S. 596; *Robbins v. Holley*, 1 T. B. Mon. 191. Cross-demands and counterclaims, whether arising out of the same or wholly disconnected transactions, and whether liquidated or unliquidated, may be enforced by way of setoff whenever the circumstances are such as to warrant the interference of equity to prevent wrong and injustice: *North Chicago Rolling Mill Co. v. St. Louis etc. Steel Co.*, 152 U. S. 596, 615. The impossibility of obtaining the benefit of a setoff in an ordinary suit at law also authorizes a court of equity to enforce it: *Ainslie v. Boynton*, 2 Barb. 258, 263. If, however, the demand against which the setoff is urged has been assigned, it must appear that the insolvency or removal from the state occurred before the assignment: *Robbins v. Holley*, 1 T. B. Mon. 191. Cross-demands, though un-

liquidated by judgment, and although not within the statute of setoff, will, after the insolvency of one of the parties, be set off in equity against one another, if, from the situation of the parties, justice cannot otherwise be done: *Davidson v. Alfaro*, 80 N. Y. 660. If the plaintiff is a married woman, against whom a personal judgment cannot be rendered, a court of equity will set off a debt due from her to the defendant as administrator, against an individual debt, though the two demands could not be set off at law, the debts not being due in the same right. Nor would the setoff be available in equity if the plaintiff were solvent and *sui juris* so that a personal judgment against her would be effective: *Farris v. Houston*, 78 Ala. 250. The obligation of a bankrupt prior to his discharge cannot be set off against a claim contracted subsequent to his discharge: *Petitpain v. Redeau*, 6 La. Ann. 411; and if a creditor, in proving his claim before a register in bankruptcy, fails to credit the bankrupt with an unsatisfied claim against himself, he cannot, when sued by the assignee for such claim, plead as a setoff the amount allowed him by the register. A party defendant, by pleading a setoff, practically brings an action for the amount of that setoff. Consequently, the creditor, by presenting and proving his claim before the register, is to be deemed as having waived "all right of action or suit against the bankrupt" under the statute, and the creditor will not be allowed to do that indirectly which the statute precludes him from doing directly. In other words, he cannot accomplish, by way of setoff, that which he would be debarred from asserting in a direct action: *Russell v. Owen*, 61 Mo. 185; *Brown v. Farmers' Bank*, 6 Bush, 198. But in *Bemis v. Smith*, 10 Met. 194, 199, it is held that if a creditor acts unadvisedly in proving his claim against an insolvent, he may withdraw it so far as he is allowed so to do; that there seems to be no good reason why his legal and equitable rights should be barred by a mere mistake, and that the defendant, by proving his debt in part before the master, is not precluded from his claim of setoff as to the part so proved. To make a setoff after insolvency or removal from the state available in equity the allegation of insolvency or of nonresidence should, of course, be properly made. The fact of insolvency or of nonresidence should be made to appear clearly: *Duncan v. Magette*, 25 Tex. 245, 249; *Levy v. Steinbach*, 43 Md. 212, 217; *Marshall v. Cooper*, 43 Md. 46, 57.

MUST DEMAND BE DUE?—Some of the courts hold that when a party asks to have his claim against an insolvent estate set off against a demand upon him held by an assignee for the benefit of creditors, it will not be allowed unless his claim upon the estate was due when the assignment was made. The allowance of his claim, if due, is placed upon the ground that, by reason of the existence of cross-demands at the time of the assignment, which were due, or might have become due at the creditor's election, an equitable adjustment by way of setoff is made without interfering with the equities of others. But, after the estate has passed to an assignee upon a trust to hold for and to distribute among creditors, it is said that the former and natural equity disappears in superior equities vesting in the general body of creditors. They are then interested, it is said in having equality of distribution, and if a creditor who, when the assignment was made, had no right of setoff, is allowed it afterward, he gains a preference. By the intervention of the rights of third persons, under the assignment, the equities change, it is claimed, with the change in the situation of the original parties, to the misfortune of the creditor holding the demand against the insolvent estate, but nevertheless in accordance with equitable principles: *Fera v. Wickham*, 135 N. Y. 223; 29 Abb. N. C. 200; reversing *Fera v. Wickham*, 61 Hun, 348;

Hughitt v. Hayes, 136 N. Y. 163; *Newcomb v. Almy*, 96 N. Y. 303; *Jordan v. National Shoe etc. Bank*, 74 N. Y. 467; 30 Am. Rep. 319; *Martin v. Kunzmüller*, 37 N. Y. 396; 10 Bosw. 16; *Bradley v. Angel*, 3 N. Y. 475; *Laybourn v. Seymour*, 53 Minn. 105; 39 Am. St. Rep. 579; *Oatman v. Batavian Bank*, 77 Wis. 501; 20 Am. St. Rep. 136; *Spaulding v. Backus*, 122 Mass. 553; 23 Am. Rep. 391; *Bosler v. Exchange Bank*, 4 Pa. St. 32; 45 Am. Dec. 665; *Huse v. Ames*, 104 Mo. 91; *Lockwood v. Beckwith*, 6 Mich. 168; 72 Am. Dec. 69; *Appeal of Farmers' etc. Bank*, 48 Pa. St. 57. An indebtedness, therefore, of an insolvent debtor which matures after his assignment for the benefit of creditors cannot be the subject matter of setoff against his assignee: *James v. McPhee*, 9 Col. 486; *Martin v. Kunzmüller*, 37 N. Y. 396; *Fera v. Wickham*, 135 N. Y. 223; 29 Abb. N. C. 200; reversing *Fera v. Wickham*, 61 Hun, 343; *Huse v. Ames*, 104 Mo. 91; and it follows that until a claim against an insolvent debtor has matured he may defeat the creditor's right of setoff by an assignment of the cross-demand: *Myers v. Davis*, 22 N. Y. 489; reversing *Myers v. Davis*, 26 Barb. 367. There are circumstances, however, under which a court of equity may restrain a creditor of the insolvent from enforcing a definite claim against him until an undefined indebtedness due from the insolvent is ascertained: See *infra*, subdivision "Account," "Attachment," etc.

A setoff is enforceable against an assignee for the benefit of creditors if it is a demand which became due from the assignor at or before the making of the assignment: *Laybourn v. Seymour*, 53 Minn. 105; 39 Am. St. Rep. 579; *Smith v. Spengler*, 83 Mo. 408; *Fera v. Wickham*, 135 N. Y. 223; 29 Abb. N. C. 200; reversing *Fera v. Wickham*, 61 Hun, 343; *Armstrong v. Warner*, 49 Ohio St. 376. If no right of setoff exists when an assignment by an insolvent debtor for the benefit of creditors is made, it cannot afterward arise in favor of one indebted to the insolvent estate who is also a creditor. If, therefore, there was among the assets transferred by such an assignment a demand against one who at the time the assignment was made held a demand against the assignor which had not then matured, he is not entitled to a setoff, although his claim against the estate matures before that against him: *Fera v. Wickham*, 135 N. Y. 223; 29 Abb. N. C. 200; reversing *Fera v. Wickham*, 61 Hun, 343. In the administration of the estate of an insolvent debtor, equality among creditors is equity as a general rule; but courts are not required to ignore the principle that only the balance, in case of mutual debts, is the real sum owing by or to the insolvent. Courts of equity will regard claims as due even in the absence of a technical demand, if equitable considerations require that they should be applied each to the other.

Other courts make a distinction between cases where the debt of the insolvent is not due and those where a debt owing to the insolvent is not due, and will allow a setoff in the latter class of cases: *Bradley v. Angel*, 3 N. Y. 475; *Jones v. Piening*, 85 Wis. 264; *Stephens v. Schuchmann*, 32 Mo. App. 333; *Jones v. Robinson*, 26 Barb. 310; *Yardley v. Clothier*, 51 Fed. Rep. 506; *Drake v. Rollo*, 3 Biss. 273; *Kentucky Flour Co. etc. v. Merchants' Nat. Bank*, 90 Ky. 225. Otherwise expressed, a setoff will be allowed in equity, on the application of the complainant, where the defendant is insolvent, although the debt of the complainant to the defendant is not due; but it will not be allowed if the debt of the defendant to the complainant is payable at a future day: *Bradley v. Angel*, 3 N. Y. 475; *Lindsay v. Jackson*, 2 Paige, 581; *Coster v. Griswold*, 4 Edw. Ch. 364, 374; *Mel v. Holbrook*, 4 Edw. Ch. 539; *Chance v. Isaacs*, 5 Paige, 592. An assignee of an insolvent debtor "has no author-

ity to waive the time of credit secured for the sole benefit of his assignor, and pay a debt not due, with credits or the avails of credits which are due to the assignor at the time of making the assignment, for to do so would tend to prejudice the creditors of the insolvent's estate; but a debtor to such estate, whose debt was not due at the time of the making of such assignment, has the authority to waive the time of credit which was secured for his own benefit, and pay the same at once in money or by way of setoff of the amount due him from such estate": *Jones v. Piening*, 85 Wis. 264, 267, per Cassoday, J.; *Hughitt v. Hayes*, 136 N. Y. 163. On the other hand, the insolvency of a party is held to be good ground of equitable setoff, even where the indebtedness on one side is not due, and that it makes no difference in which party's favor is the immatured debt: *Nashville Trust Co. v. Bank*, 91 Tenn. 336, 354. It is said, in this case, that the supposed hardship or injustice resulting from the anticipation of the immatured debt may and should be wholly obviated by discounting it or adding interest to the due debt for the unexpired time of the debt not due, and in this way equalize the interest. The allowance of the equitable setoff in a case where the creditor's claim against the assignor was not due at the date of the making of a general assignment is not supposed to be in conflict with the principle of equal and ratable distribution of the assignor's assets, as the balance due constitutes the assets for distribution: *Nashville Trust Co. v. Bank*, 91 Tenn. 336. It must be observed, however, that cases may arise in which there is as strong a natural equity that the whole of the estate of the insolvent should be distributed ratably among the creditors, as that part of the assets should be first set apart and applied to compensate the particular debt of the complainant. Where the equities are as strong on one side as on the other, the legal right must be left to prevail: *Chance v. Isaacs*, 2 Edw. Ch. 348.

PURCHASE OF CLAIM WITH KNOWLEDGE OF INSOLVENCY.—A defendant, in a suit by an assignee in insolvency or by a receiver, will not be allowed in either a court of law or of equity to interpose as a setoff or counterclaim. By reason of the assignor's insolvency, a claim against the insolvent purchased after the commencement of the insolvency proceedings with knowledge of the insolvency: *Smith v. Brinkerhoff*, 6 N. Y. 305; affirming same case, 8 Barb. 519; *Enter v. Quesse*, 30 S. C. 126; 14 Am. St. Rep. 891; *Case v. Cannon*, 23 La. Ann. 112; *Smith v. Hill*, 8 Gray, 572; *Colt v. Brown*, 12 Gray, 233; *Diven v. Phelps*, 34 Barb. 224; *Long v. Penn Ins. Co.*, 6 Pa. St. 421; *Pond v. Harwood*, 139 N. Y. 111; *Mayo v. Davidge*, 44 Hun, 342. But in California it is held that a claim against an insolvent, purchased by his debtor prior to the adjudication of insolvency, but with full knowledge, at the time of the transfer, of the fact of the insolvency, may be set off by the debtor against the debt due from him to the insolvent: *Conroy v. Dunlap*, 104 Cal. 133.

DEFEAT OF SETOFF BY ASSIGNMENT.—A claim which a party has a right to set off may be assigned and enforced as a setoff in the name of the assignee after suit brought: *Kinney v. Tubor*, 62 Mich. 517; *Dingee v. Shears*, 29 Hun, 209; *Levy v. Steinbach*, 43 Md. 212; but until a claim is due, the right of setoff may be defeated by an assignment or sale of the cross-demand: *Myers v. Davis*, 22 N. Y. 489; reversing same case, 26 Barb. 367.

RIGHTS AND LIABILITIES OF ASSIGNEE OR RECEIVER.—An assignee for the benefit of creditors takes the debtor's estate subject to all equities existing at the date of the assignment. He is not a purchaser for value without

notice. All claims due the insolvent pass to his assignee subject to all defenses which existed against them in the hands of the bankrupt. The assignee is the mere representative of the assignor and his estate, and stands in his shoes: *Nashville Trust Co. v. Bank*, 91 Tenn. 336; *Kentucky Flour Co. v. Merchants' Nat. Bank*, 90 Ky. 225; *Green v. Conrad*, 114 Mo. 651; *Stow v. Yarwood*, 20 Ill. 497; *Merwin v. Austin*, 58 Conn. 22. Consequently, if one has a right of setoff against another, who makes an assignment for the benefit of his creditors, the right is equally available against the assignee; *Scanmon v. Kimball*, 92 U. S. 362. So with receivers; they are not regarded as purchasers for a valuable consideration, but as the voluntary assignees and personal representatives of the insolvent, and the assignment to them passes the rights and property of the insolvent precisely in the same plight and condition, and subject to the same equities, as they were held by the insolvent. A debtor of the insolvent, therefore, has the same equitable right of setoff against a claim of the receivers that he had against the insolvent debtor at the time of his insolvency: *Receivers v. Paterson Gas Light Co.*, 23 N. J. L. 283; *Stephens v. Schuchmann*, 32 Mo. App. 333; *Scott v. Armstrong*, 146 U. S. 499; *In re Assignment of Hamilton*, 28 Or. 579. An assignee or receiver cannot set up a claim or right to retain the property in his hands, or its proceeds, in opposition to the title which it apparently confers. He cannot offset his own debt against the common fund extended to him for distribution: *Henriques v. Hone*, 2 Edw. Ch. 120; *Vincent v. Gandolfo*, 12 La. Ann. 526. In a suit by the assignee of an insolvent debtor, on a covenant of warranty in a deed of land made to such debtor, the defendant may set off notes and accounts due to him from such debtor. He may also set off such notes and accounts, in a suit on such covenant, brought by the purchaser of the land at the assignee's sale thereof, if the purchaser, when he bought the land, had notice that the defendant claimed such setoff: *Bemis v. Smith*, 10 Met. 194. If a bankrupt, upon the eve of his insolvency, fraudulently delivers goods to one of his creditors, the assignee may disaffirm the contract, and recover the value of the goods in trover; but if he brings assumpsit, he affirms the contract, and the creditor may then set off his debt: *Benoist v. Darby*, 12 Mo. 196. A bond due from a bankrupt cannot be set off against the defendant's note to a third person assigned to the assignee of the bankrupt's effects after commission: *McIver v. Wilson*, 1 Cranch C. C. 423. So, where an assignment is made for the benefit of creditors, to be sold by the assignees for the payment of debts, the creditors of the assignor cannot offset their demands in payment of articles purchased by them at the public sale of the goods by the assignees: *Bateman v. Connor*, 6 N. J. L. 104.

ACCOUNT—AGENCY—ATTACHMENT—ATTORNEY'S LIEN.—A claim against an insolvent for goods sold and delivered is a subject matter of setoff if the claim is due, otherwise not: *Myers v. Davis*, 22 N. Y. 489; 26 Barb. 367. An agent cannot set off, as against his principal's assignee in bankruptcy, claims accruing after the date of the assignment, and not originating out of the duties of his agency: *Crosbie v. Leary*, 6 Bosw. 312. A garnishee has a right to set up any defense against the attachment process which he could have done against the debtor in the principal action; and if the debtor is insolvent and owes the garnishee on a note not due, for which he has no sufficient security, he is not bound to risk the loss of his debt in answer to the garnishee process, but may go into equity for relief by way of equitable setoff: *Schuler v. Israel*, 120 U. S. 506; commented upon in *North Chicago*

Rolling Mill Co. v. St. Louis etc. Steel Co., 152 U. S. 596, 616. The rights of a garnishor do not rise above or extend beyond those of his debtor; and it is a recognized principle that the garnishee shall not, by operation of the proceedings against him, be placed in any worse condition than he would have been in had the principal debtor's claim been enforced against him directly; and that the liability, legal and equitable, of the garnishee to the principal debtor is a measure of his liability to the attaching creditor, who takes the shoes of the principal debtor, and can assert only the rights of the latter. Therefore, a garnishee occupying the double position of debtor to the principal defendant in a definite or ascertained amount, and that of a creditor of such principal debtor, by way of unliquidated damages arising out of the breach of a contract in existence when the garnishment proceedings were instituted, can, after an order at law subjecting the defined indebtedness to the payment of the garnishor, invoke the aid of a court of equity to restrain the garnisheeing creditor from enforcing the payment of the amount due until the unliquidated damages can be ascertained and set off against such indebtedness, on the ground that the principal debtor is insolvent and a nonresident of the state in which the garnishment proceedings are had: *North Chicago Rolling Mill Co. v. St. Louis etc. Steel Co.*, 152 U. S. 596. As to how far the lien of an attorney for professional services may be supported in an equitable action by way of setoff against a judgment, compare *Davidson v. Alfaro*, 80 N. Y. 660; *Marshall v. Cooper*, 43 Md. 46; *Levy v. Steinbach*, 43 Md. 212.

BANKS, GENERALLY. — (a) *Set-off in Favor of Bank, when Allowed and when not.*—The effect of the insolvency of a bank closing its doors and stopping its business is to make all its deposit accounts and certificates of deposit at once become due without demand or notice, and in settling its affairs equity and justice require that the receiver shall deduct from the amount due a creditor all sums for which he is a debtor, and shall allow a debtor credit for all sums as to which he is a creditor. A debtor is one who, upon the appointment of the receiver, is liable to the bank for the payment of money, whether as principal or surety, or whether the liability be matured or not; and a creditor is one to whom the bank is indebted at the date of such appointment, whether the debt is due or not. The creditor may assign his claim after the appointment of the receiver, but such assignment is subject to the receiver's right to set off claims the bank may have against the creditor: *Davis v. Industrial Mfg. Co.*, 114 N. C. 321. A bank officer of an insolvent bank wrongfully withholding its assets cannot require the allowance of a setoff or counterclaim as a condition precedent to the delivery of the possession of such assets: *State v. Commercial etc. Bank*, 37 Neb. 174.

If an insolvent debtor who makes an assignment for the benefit of creditors is indebted to a bank with which he has money on deposit, it has been held that the bank may apply the deposit as a credit on its debt, although the debt had not matured at the time the assignment was made, as the right of equitable setoff exists; and the bank may so set off when sued by the assignee for the benefit of creditors: *Kentucky Flour Co. v. Merchants' Nat. Bank*, 90 Ky. 225; *Fisher v. Hanover Nat. Bank*, 64 Fed. Rep. 832; *Pennsylvania Bank v. Farmers' etc. Bank*, 130 Pa. St. 209; *Nashville Trust Co. v. Bank*, 91 Tenn. 336; *Ford v. Thornton*, 3 Leigh, 695; *Knecht v. United States Sav. Inst.*, 2 Mo. App. 563; *State Bank v. Armstrong*, 4 Dev. L. 519; *Demmon v. Boylston Bank*, 5 Cush. 194; *Jones v. Robinson*, 26 Barb. 310. But a setoff in favor of the bank in such cases has been denied upon

the ground that the debt to the bank was not due: *Jordan v. National Shoe etc. Bank*, 74 N. Y. 467; 30 Am. Rep. 319.

A bank does not have a right, it is said, to retain a customer's deposit as against an assignee for creditors to pay or apply upon an indebtedness of the customer to the bank not yet matured: *Jordan v. National Shoe etc. Bank*, 74 N. Y. 467; 30 Am. Rep. 319; *Beckwith v. Union Bank*, 9 N. Y. 211. If a debt owing to a bank by an insolvent is not due, it cannot be set off against a debt due from the bank to him, and his assignee in insolvency may consequently sustain an action against the bank therefor: *Oatman v. Batavian Bank*, 77 Wis. 501; 20 Am. St. Rep. 136; *Chipman v. Ninth Nat. Bank*, 120 Pa. St. 86; *Stetson v. Exchange Bank*, 7 Gray, 425.

The bank cannot, as against a debt due from it to an assignor for the benefit of creditors, and matured before the insolvency, set off notes or drafts indorsed by and discounted for the assignor before the assignment for the benefit of creditors, but maturing afterward: *Chipman v. Ninth Nat. Bank*, 120 Pa. St. 86; or notes left with it for discount, but which it refused to discount: *Stetson v. Exchange Bank*, 7 Gray, 425. A bank may, however, set up by way of counterclaim that an assignment was fraudulent. Thus, the plaintiffs, being assignees of an insolvent debtor for the benefit of creditors, made a general deposit of the proceeds of the assigned property in the defendants' bank. The defendants, who were creditors of the assignor, subsequently brought an attachment suit, in which the deposit in question was attached, with other property, and obtained judgment therein, on which execution was returned unsatisfied; and, in an action by the assignees to recover the deposit, it was held that the defendants might set up by way of counterclaim that the assignment was fraudulent as against creditors, and seek to apply the deposit in payment of their debt: *Lawrence v. Bank of the Republic*, 3 Robt. 142. The receiver of an insolvent bank may, where a note is due to it in a few days, and where the debtor has a deposit in the bank to his credit, apply the deposit in satisfaction of the debt due to the bank: *Jones v. Robinson*, 26 Barb. 310.

(b) *Setoff against Bank Allowed when and when not.* — The right of the debtors of a bank to an equitable setoff of their demands is not affected by the appointment of a receiver upon its stopping payment: *In re Receiver of Middle Dist. Bank*, 1 Paige, 585; 19 Am. Dec. 452. Therefore, if a bank becomes insolvent, and a receiver is appointed, or its assets are placed in the hands of commissioners for liquidation, the depositor may set off his deposit against his notes to the bank or other indebtedness: *Yardley v. Clothier*, 49 Fed. Rep. 337; *State v. Brobston*, 94 Ga. 95; 47 Am. St. Rep., ante, p. 138, and note; *Hughitt v. Hayes*, 136 N. Y. 163; *Beatty v. Scudday*, 10 La. Ann. 404; *McCagg v. Woodman*, 28 Ill. 84; *In re Van Allen*, 37 Barb. 225; *Receiver etc. v. Tartter*, 54 How. Pr. 385; *Coll v. Brown*, 12 Gray, 233; *Clarke v. Hawkins*, 5 R. L. 219; *Finnell v. Nesbit*, 16 B. Mon. 351; *Third Swedish M. E. Church v. Wetherell*, 43 Ill. App. 414; *Second Nat. Bank v. Hemingray*, 34 Ohio St. 381; *Smith v. Spengler*, 83 Mo. 408; *Jones v. Piening*, 85 Wis. 264; *Salladin v. Mitchell*, 42 Neb. 859. The depositor may, of course, set off against the bank any other credit due him, as well as a deposit, when sued by the receiver: See cases last cited. Notes and other evidences of debt held by the bank are assets of the bank only so far as there may be balances due to the bank thereon after deducting the amounts of the respective deposits made bona fide while the bank did business, and its effects were under its own control: *State v. Brobston*, 94 Ga. 95; 47 Am. St. Rep., ante, p. 138. The maturity of the indebtedness due to the bank is not material. In *Yard-*

ley v. Clothier, 49 Fed. Rep. 337, a depositor in an insolvent bank who had indorsed a note that was subsequently discounted by the bank was allowed, in a suit by the bank to recover the amount of the note, to set off his deposit against this amount, although the note matured after the insolvency of this bank. Although a debt owing by the insolvent may not be due, the creditor may waive the credit and a court of equity will then apply it upon the debt from the insolvent if that has matured: *Hughitt v. Hayes*, 136 N. Y. 163. A debtor of an insolvent bank, whether his indebtedness has actually matured or not at the time of the insolvency, may set off against his indebtedness to the receivers either a deposit in the bank, or bills of the bank received by him in good faith before the failure of the corporation: *Receivers v. Paterson Gas Light Co.*, 23 N. J. L. 283; *Jones v. Piening*, 85 Wis. 264. The right of setoff against an insolvent bank also exists in favor of one who has acquired the title to money due from the bank on a certificate of deposit issued to a third person without a formal assignment by the latter: *Salladin v. Mitchell*, 42 Neb. 859. So, if one of several indorsers of a note of an insolvent debtor to an insolvent bank is also a creditor of such bank he is entitled to avail himself of his claim in settlement of his proportionate part of his liability on such note, which will be greater or less according to the solvency or insolvency of the other indorsers: *Davis v. Industrial Mfg. Co.*, 114 N. C. 321.

On the other hand, after an assignment by an insolvent bank, if the assignee of a claim is himself a debtor of the bank, he cannot use the assigned claim as a setoff against the bank: *Davis v. Industrial Mfg. Co.*, 114 N. C. 321. So, if stock in the hands of an insolvent banker is converted prior to the banker's assignment, though on the same day, not directly by the banker, but by creditors with whom he has pledged it, the owner of the stock is not, upon the theory that the conversion of the stock was a breach of trust which enables him to follow the proceeds specifically, entitled to payment in full out of the assigned estate: *Jamison's Appeal*, 163 Pa. St. 143, 156. A debtor to a bank cannot set off against it the dividend that will be coming to him as a stockholder in the company when its affairs are wound up: *Ruckersville Bank v. Hemphill*, 7 Ga. 396. Neither can the debtor of an insolvent bank set off against it a check drawn in his favor by another depositor: *Butterworth v. Peck*, 5 Bosw. 341. So a debtor of a suspended bank, acquiring a check or certificate of deposit thereon with knowledge of the suspension, cannot set off the amount thereof against his debt, though he acquires the check before a receiver for the bank is appointed: *Re Assignment of Hamilton*, 26 Or. 579; *Stone v. Dodge*, 96 Mich. 514. The fact that a bank, after its receiver is appointed, makes an assignment for the benefit of creditors, does not discharge the lien in favor of all its creditors which attached to its assets upon the receiver's appointment, so as to permit a debtor of the bank to set off against his debt the amount of a check drawn on the bank acquired by him after the appointment of the receiver, but before the assignment. On the contrary, the equitable interest acquired in the assets of an insolvent bank by a receiver appointed in an action for their distribution merges into a legal lien for the benefit of creditors upon the discharge of the receiver and the appointment of an assignee for the benefit of creditors; and debtors of the insolvent bank do not acquire by such appointment any right of offset on account of claims as to which such right did not exist against the receiver: *Re Assignment of Hamilton*, 26 Or. 579. The debtor of an insolvent bank cannot counterclaim the amount of a deposit against the assignees of an insolvent banker who have acquired

the chose in action, such as a mortgage, sued upon by them, before its maturity, though it did not become due until after the execution of the assignment for the benefit of creditors: *Richards v. La Tourette*, 53 Hun, 622. Neither is there any right of setoff against a certificate of deposit in ordinary form, indorsed by a bank which afterward becomes insolvent, until a demand for payment has been made: *Munger v. Albany City Nat. Bank*, 85 N. Y. 580. Stock in bank cannot be set off against a note given to the bank: *Harper v. Calhoun*, 7 How. (Miss.) 203; *Whittington v. Farmers' Bank*, 5 Har. & J. 489. The receiver of an insolvent bank cannot allow a setoff against a debt owing to the bank, where the demand sought to be set off was assigned to the debtor for that purpose after his appointment; and what the receiver cannot thus do directly cannot be done by way of ratification or waiver: *Van Dyck v. McQuade*, 85 N. Y. 616; and in a suit by the receiver of an insolvent bank against a stockholder to compel him to pay an unpaid subscription to the stock, the defendant cannot set off a deposit due him from the bank, as the other creditors have a right to rely upon his paying in the money due from him for stock as part of the fund for the payment of the debts: *Williams v. Traphagen*, 38 N. J. Eq. 57. In *Eastern Bank v. Capron*, 22 Conn. 639, where the receivers of the insolvent bank sued the indorser of a note, which was held as part of the assets of the bank, the court would not allow bills of the same bank to be set off against the plaintiffs' demand, although a portion of the bills were held by the defendant at the time of the bank's failure and when the note became due. In this case the bank failed before the note became due. As to national and savings banks see those heads *infra*.

CORPORATIONS.—A setoff is allowable in equity, after insolvency, though one of the parties to the claim is a corporation from which or to which something is due, and though it is not within the statutes respecting the allowance of setoffs: *Laybourn v. Seymour*, 53 Minn. 105; 39 Am. St. Rep. 579. Thus, if persons indebted to a corporation on account hold its express contract to deliver a certain amount of manufactured goods, and prior to any demand being made for the goods the corporation becomes insolvent and makes a general assignment for the benefit of creditors, such persons may, in a suit against them by the assignee for the benefit of creditors to recover on the account, set off their demand on the contract against the insolvent: *Laybourn v. Seymour*, 53 Minn. 105; 39 Am. St. Rep. 579. A judgment against an insolvent corporation merges the prior proceedings leading up to it, and constitutes a cause of action, so that when it is made the foundation of a suit at law it becomes the contract in suit, and is subject to a counterclaim, although the original claim sued on may have been in tort: *Green v. Conrad*, 114 Mo. 651. A building and loan association may have a right of setoff against the assignee of an insolvent shareholder therein. Thus, if one of its by-laws prohibits the transfer of any share of stock while anything due upon it remains unpaid, a lien is thereby created in favor of the association for the indebtedness due against the shareholder, which, in case of his insolvency, is available against his assignee; and in an action by the assignee of an insolvent member for the withdrawal value of shares, the association may, under such a by-law, set off an amount which the association had on deposit with the assignor, as a banker, at the time of his assignment: *Wetherell v. Thirty-first Street etc. Assn.*, 153 Ill. 361. A debt due a corporation may sometimes be set off against a dividend. For example, if a heavy stockholder in a corporation owes it a large amount of money, and becomes insolvent, and the receiver gathers a comparatively

small amount of assets, not including the stock of such debtor, it is possible for there to be a receivership without a dissolution, with the added possibility that, if the circumstances shall be found to justify such a course, the receivership may be discharged, and the corporation allowed to resume its functions and manage its own affairs. But, in such a case, where there is a fund to be distributed, equal justice and equity among the stockholders requires that the fund to be distributed shall be made to repay to the corporation, so far as it is sufficient to do so, that share of the corporate funds which such debtor, by becoming indebted to the corporation, had withdrawn for his individual use, to the detriment of the other stockholders. This, it is said, is plain natural equity, and his insolvency makes it impossible to do justice to the other stockholders except by making his distributive share of this fund compensate, so far as it will, the debt which he owes to the corporation, and is therefore a peculiar circumstance which makes it the duty of a court of equity to order the debt to be set off against the dividend: *Merrill v. Cape Ann Granite Co.*, 161 Mass. 212, 218. So, where a stockholder is indebted to an insolvent corporation for unpaid shares. The unpaid subscription to stock or shares constitutes a trust fund for the benefit of the general creditors of the corporation, and such debtor cannot set off against it a debt due him by the corporation. The fund arising from such unpaid shares must be equally divided among all the creditors: *Sawyer v. Hoag*, 17 Wall. 610; *Mathis v. Pridham*, 1 Tex. Civ. App. 58. A corporation is entitled to set off calls made before its winding up upon unpaid shares and debentures, as against a pledgee of the debentures, who does not give notice of the assignment until after the call is made; but it cannot set off calls made in the winding up subsequent to such notice and its entry on the register of debentures: *Christie v. Taunton* (1893), 2 Ch. 175. Again, where a creditor waives his right of setoff against an insolvent corporation, he cannot afterward assert it. To allow him to do so would be practicing a fraud upon the other creditors of his debtor: *Hall v. United States Ins. Co.*, 5 Gill, 484.

EXECUTORS AND ADMINISTRATORS.—A claim against an insolvent estate of a decedent may be set off in chancery against one in favor of the estate: *Nims v. Rood*, 11 Vt. 96; 34 Am. Dec. 669; *Hosmer v. Merriam*, 1 Root, 427; although the claimant, owing to an agreement of the administrator, neglected to present his claim to the commissioners of the estate: *Nims v. Rood*, 11 Vt. 96; 34 Am. Dec. 669. Thus, the maker of a promissory note, the payee having died insolvent, is entitled, in a suit upon the note brought by the administrator of the insolvent estate, to set off demands against the estate arising out of a breach of covenant in a conveyance in consideration whereof the note was given, even though he has not filed his claim before the commissioners of insolvency: *Morrison v. Jewell*, 34 Me. 146. Offsets acquired subsequently to the death are, however, at the risk of the purchaser, and he cannot set them up against the insolvent estate, as he would thereby gain a great advantage over other creditors, who are by law entitled to equal protection. It would be throwing open the door to fraud, by suffering creditors to effect, by transferring their claims to the debtors of insolvent estates, what they could not directly do: *Whitehead v. Cade*, 1 How. (Miss.) 95; *Happoldt v. Jones*, Harp. 109. In a suit brought by the administrator of an insolvent estate a setoff of a demand not yet due from the estate has been denied: *Bradley v. Angel*, 3 N. Y. 475; but allowed where it was not due at the time of the death, but became due before the commencement of the suit: *Bosler v. Exchange Bank*, 4 Pa. St. 32; 45 Am. Dec. 665; or

pending the suit: *Bigelow v. Folger*, 2 Met. 255. In an action against two persons by the administrator of an insolvent estate, upon a joint debt, the defendants cannot set off their several claims allowed by the commissioners of insolvency against such estate: *Fuller v. Wright*, 18 Pick. 403.

INSURANCE COMPANIES.—The right of setoff is available against an insurance company which has become bankrupt, and equally available against its assignee: *Scammon v. Kimball*, 92 U. S. 362; *Sovereign Life Assur. Co. v. Dodd* (1892), 1 Q. B. 405. A claim for a loss under an insurance policy may be set off by the insured against his indebtedness to the company. If his indebtedness is not due, and the company is insolvent, a bill in equity will lie to establish the setoff: *Drake v. Rollo*, 3 Biss. 273. Thus, a claim for loss by fire against an insolvent fire insurance company may be set off against a bond and mortgage given for money borrowed of the company: *In re Globe Ins. Co.*, 2 Edw. Ch. 625. The obligation of an insurer upon his premium note could not, however, be set off against his claim on the insolvent company for a loss: *Pardo v. Osgood*, 2 Abb. Pr., N. S., 365. If a person, as to an insurance company, stands in the double relation of stockholder and debtor, and, upon the company's becoming insolvent, he takes an assignment from a stranger of an unpaid balance due on a policy of insurance by the company, he cannot set off the whole demand, thereby decreasing the fund to which all the creditors, pro rata, are entitled: *Long v. Penn Ins. Co.*, 6 Pa. St. 421. One who borrows money from an insurance company upon an endowment policy may set off the amount of the policy against the loan in an action to recover it after the policy is due by its terms, and a winding-up order has been made against the company, notwithstanding an arrangement sanctioned by the court without his assent by which all policies of such company were transferred to another company, and the holders thereof are to receive a less sum in full, which in his case would be less than the loan: *Sovereign Life Assur. Co. v. Dodd* (1892), 1 Q. B. 405. In New York, a defendant held two paid-up endowment insurance policies, payable to the defendant's wife in case of his death prior to a specified date; otherwise to the defendant, the reserved value of which was two thousand seven hundred and seventy-nine dollars and ninety-five cents. In a suit by the receiver of the company on certain claims held by the company against the defendant it was held that the defendant was not entitled to set off the said reserve value, on the ground that at the time of the appointment of the plaintiff as receiver the policies had not become due, and that it was not, therefore, known to whom they would be payable: *Newcomb v. Almy*, 96 N. Y. 308. But this opinion is criticised in *Carr v. Hamilton*, 129 U. S. 252, holding that when a life insurance company becomes insolvent and goes into liquidation the amount due on an endowment policy, payable in any event at a fixed time, and sooner if the party dies before that time, should, in settling the company's affairs, be set off against the amount due on a mortgage debt from the holder of the policy to the company, by way of compensation or reconversion. The New York case did not advert "to the fact that the interests of all the parties became fixed by the insolvency of the company, and must be computed as expectancies reduced to present values." If a life insurance company becomes insolvent before the time fixed for the termination of an endowment policy, payable to the holder in case of survival until that time, or to his children in case of his death before it, the contingent interest of each party is fixed by the insolvency, to be determined by the tables ordinarily used for that

purpose: *Carr v. Hamilton*, 129 U. S. 252. A banker, who is a director of an insurance company, can set off against its demand for money it has on deposit with him, bearing interest and payable on call, the amount due on its policies issued to and held by him: *Scammon v. Kimball*, 92 U. S. 362. If the holder of a life policy borrows money of his insurer, it will be presumed prima facie that he does so on the faith of the insurance and in expectation of possibly meeting his own obligation to the company by that of the company to him: *Carr v. Hamilton*, 129 U. S. 252.

JOINT AND SEPARATE DEBTS—JUDGMENTS.—At law joint debts cannot be set off against separate debts, nor separate debts against joint debts, because in such cases the parties are not the same: See monographic note to *Gregg v. James*, 12 Am. Dec. 153, on setoff; but in particular cases in equity joint and separate debts may be set off against each other, after insolvency, as where the debts are, in reality, mutual, though prosecuted in the names of others nominally interested: *Blake v. Langdon*, 19 Vt. 485; 47 Am. Dec. 701; *Chenault v. Bush*, 84 Ky. 528. An individual claim cannot be set up as a counterclaim to a joint indebtedness without alleging that the plaintiff is insolvent: *Collier v. Ervin*, 3 Mont. 142; but if it is necessary to effect a clear equity or to avoid irremediable injustice, a setoff will be allowed though the debts are not mutual: *Cosgrove v. Cosby*, 86 Ind. 511. The merger of a debt into judgment is not so perfect in equity as to preclude the judgment creditor from resorting to the original demand and the relations of the parties to it, for the purpose of enabling him to disclose and assert an equitable setoff. The holder of a promissory note, who took it after maturity, holds it subject to every objection, including equitable setoff, to which it was subject in the hands of his assignor. Hence, the maker of a separate note in suit, who holds an overdue joint note made by the plaintiff and another, who are both insolvent, may, in equity, set off the joint demand: *Baker v. Kinsey*, 41 Ohio St. 403. Again, if two parties, one of whom is insolvent, hold a judgment against a third, and he has a judgment against the insolvent, a court of equity to prevent injustice will ascertain the interest of the insolvent plaintiff in the former judgment, and will set off against his interest the judgment against him: *Fulkerson v. Davenport*, 70 Mo. 541. A discharge in insolvency of one of two joint judgment debtors transforms the debt in equity into a several one against the other, so that an assignee may make it a setoff against a judgment held by the other against him, and thus obtain satisfaction of the latter judgment: *Cosgrove v. Cosby*, 86 Ind. 511.

A judgment against a bankrupt, pending the settlement of his estate, for conversion is not a proper setoff in the hands of an assignee thereof, against whom he brings suit on a chose in action set off to him by the bankrupt court as exempt from execution: *Weaver v. Voile*, 68 Ind. 191. A judgment which condemns a creditor to restore property, wrongfully taken to satisfy his claim on the eve of his debtor's cession, cannot be compensated by such claim: *Yale v. Nolan*, 3 La. Ann. 449. A judgment, upon which the defendant is in execution, will not be set off against another judgment in his favor: *Cooper v. Bigalow*, 1 Cow. 56; but after the defendant is discharged from prison under the insolvent act, the judgments may be set off: *Cooper v. Bigalow*, 1 Cow. 206. After insolvency a judgment for costs may be set off against another judgment or claim: *Crocker v. Cloughly*, 2 Duer, 684; *Mickles v. Brayton*, 10 Paige, 138. The assignee of a dormant judgment as against a defendant who is alleged to be insolvent may sustain a suit to

have it revived and set off against a judgment which has since been recovered against him by the defendant in the dormant judgment, and which the latter is proceeding to enforce by executive process, and in the meantime execution on the later judgment will be enjoined: *Simpson v. Huston*, 14 Tex. 476.

LANDLORD AND TENANT.—If a lessor makes a contract to lease a farm for a term of years, and dies before the end of the term, the rent accruing from such lease after the death of the lessor cannot be set off by a debt due to the tenant from the lessor at the time of his death, although the estate of the lessor is insolvent. The creditor must, in such a case, share ratably with the other creditors in the proceeds of the realty. The rents and profits of the realty are not liable for the debts of the decedent until they are sequestered by the court: *Washington v. Castleman*, 31 W. Va. 832.

MORTGAGE DEBTS.—A mortgagor of personal property, after default in the payment of the debt secured, but before any action has been taken on account of such default, may lawfully procure, by purchase and assignment from a third person, a debt due from the mortgagee, who is insolvent, and if the latter refuses to allow the assigned debt as a setoff, the mortgagor may go into equity to establish it, and enjoin a sale under the mortgage: *Martin v. Mohr*, 56 Ala. 221. Compare subdivision "TRUSTS," etc., *infra*.

NATIONAL BANKS.—The closing of a national bank by order of the examiner, the appointment of a receiver, and its dissolution by the decree of a circuit court necessarily transfer the assets of the bank to the receiver. In such a case the receiver takes the assets in trust for the creditors, and, in the absence of a statute to the contrary, subject to all claims and defenses that might have been interposed against the insolvent corporation. In case of insolvency the ordinary rule of equity is, that where the mutual obligations have grown out of the same transaction, insolvency, on the one hand, justifies the setoff of the debt due on the other; and there is nothing in the statutes relating to national banks which prevents the application of that rule to the receiver of an insolvent national bank under the circumstances stated. Hence, if the customer of a national bank borrows money of it in good faith, and gives his note therefor due at a future day, and deposits the amount borrowed to be drawn against, he has an equitable, though not a legal, right, in case of the insolvency and dissolution of the bank and the appointment of a receiver before the maturity of the note, to have the balance to his credit at the time of the insolvency applied to the payment of his indebtedness on the note: *Scott v. Armstrong*, 146 U. S. 499; *Adams v. Spokane Drug Co.*, 57 Fed. Rep. 888; *Armstrong v. Warner*, 49 Ohio St. 376; *Balch v. Wilson*, 25 Minn. 299; 33 Am. Rep. 467. It has been held that a depositor of the bank cannot set off his deposit against his indebtedness to the bank, as it would give a preference to one creditor of the bank after the act of insolvency: *Venango Nat. Bank v. Taylor*, 56 Pa. St. 14; *Stephens v. Schuchmann*, 32 Mo. App. 333. But if a setoff is otherwise valid, "it is not perceived," says Fuller, C. J., in *Scott v. Armstrong*, 146 U. S. 499, 510, "how its allowance can be considered a preference, and it is clear that it is only the balance, if any, after the setoff is deducted, which can justly be held to form part of the assets of the insolvent." "The requirement" of the statute "as to ratable dividends," said he, "is to make them from what belongs to the bank, and that which at the time of the insolvency belongs of right to the debtor does not belong to the bank." The indorser of a note which is discounted by a national bank, and which matures after the bank becomes in-

solvent and a receiver is appointed, may set off against the note the amount of his deposits in the bank at the time of its failure: *Yardley v. Clothier*, 51 Fed. Rep. 506. A stockholder of an insolvent national bank cannot, of course, though he happens to be one of its creditors, cancel or diminish the statutory assessment to which he is liable by offsetting his individual claim against the bank: *Hobart v. Gould*, 8 Fed. Rep. 57. So the debts of a partner and his firm to an insolvent national bank cannot, in equity, be set off by a receiver of the bank against trust moneys which the partner, after the debts were contracted, mingled with the firm deposits, without the bank's knowledge, and the whole amount of which remained continuously in the bank until it failed: *Fisher v. Knight*, 61 Fed. Rep. 491.

PARTNERSHIP.—A debt due from a bankrupt and other persons as partners may be set off against a demand due to the bankrupt individually, although the suit is in the name of the bankrupt's assignee: *Bean v. Cabbness*, 6 Ala. 343; and a judgment against an insolvent firm is a good equitable set-off to a debt due to one of the partners from the judgment creditor or his assignee: *Seligmann v. Heller*, 69 Wis. 410. A solvent firm of which a bankrupt is a member may set off against a debt due the bankrupt a debt due by the bankrupt to the firm: *Warren v. Burnham*, 32 Fed. Rep. 579; and one member of a firm will be allowed, in equity, to offset his own judgment against an insolvent debtor seeking to enforce a judgment against such firm: *Jeffries v. Evans*, 6 B. Mon. 119; 43 Am. Dec. 158. A deposit of trust moneys is a lawful setoff in favor of the trustees: *Shipman v. Lansing*, 25 Hun, 290. But a debt due a partnership cannot be set off against a debt due by an individual partner: *Weil v. Jones*, 70 Mo. 560; and money of a firm which one partner, without authority, pays to his individual creditor, which is received by the latter in good faith and applied upon the individual indebtedness, cannot be set off by the receiver of the firm against such creditor's claims against the firm: *Newhall v. Wyatt*, 139 N. Y. 452; 36 Am. St. Rep. 712. The equitable interest acquired in the assets of an insolvent partnership by a receiver appointed in an action for their distribution merges into a legal lien for the benefit of creditors upon his appointment as assignee for the benefit of creditors; and debtors of the insolvent partnership do not acquire, by such appointment, any right of setoff on account of claims as to which such right did not exist against the receiver: *Re Assignment of Hamilton*, 26 Or. 579. If a firm owes a village and the village owes a member of the firm, and gives him an order on the village treasurer, and the firm and its members make general assignments for the benefit of creditors, the village cannot set off the indebtedness of the firm to it against the order in the hands of the assignees: *Richards v. Union*, 48 Hun, 263. At law, a judgment against one partner individually is not available as a set-off, in whole or in part, against a judgment in favor of the partnership, the debts not being mutual. Neither will a court of equity, on the ground of insolvency, set off one judgment against the other, to the extent of the individual partner's interest in the judgment in favor of the partnership: *Watts v. Sayre*, 76 Ala. 397; *McGraw v. Pettibone*, 10 Mich. 530. A defendant in a suit at law cannot, in equity, set off a debt due to him as surviving partner from the plaintiff: *Hughes v. Trahern*, 64 Ill. 48.

PRINCIPAL AND SURETY.—Wherever a principal can claim a right of setoff in a court of equity, the surety is entitled to the same benefit: *Darby v. Freedman's etc. Co.*, 3 MacAr. 349. So, in an action against a surety, if the principal debtor is a party, and he is insolvent, the surety may set off against the debt sued on a debt due from the plaintiff to the principal debtor:

Becker v. Northway, 44 Minn. 61; 20 Am. St. Rep. 543; *Armstrong v. Warner*, 49 Ohio St. 376. A surety on a transferred obligation may enforce a setoff in favor of his principal and against the assignee for his own protection if the principal debtor is insolvent, the rule not applying, of course, if the thing transferred is commercial paper and the assignee becomes the bona fide holder thereof for value: *Armstrong v. Warner*, 49 Ohio St. 376. For other cases illustrating the surety's equitable right to indemnity and to enforce it by way of setoff, see *Mack v. Kittell*, 20 Abb. N. O. 293; *Merwin v. Austin*, 58 Conn. 22; *Coffin v. McLean*, 80 N. Y. 560. A surety, until he pays the money for his principal, has no available demand against him which amounts either to a setoff or an equitable discount. Hence, the insolvency of the principal at the time he assigns a note held by him upon the surety does not entitle the latter to an equity against the note in the hands of the assignee, he not having paid the debt for which he was surety until after he had had notice of the assignment. The mere fact that he was the surety of the assignor on another note, who was insolvent at the time the note sued on was assigned to the plaintiff, and also at the periods when both notes were executed, would not entitle the defendant to a setoff, nor constitute an equitable defense to an action on his note either in the name of the assignor or assignee: *Walker v. McKay*, 2 Met. (Ky.) 294. In a suit by an assignee for the benefit of creditors for a sum due the assignor, the defendant cannot set off payments made by him, after the assignment, as surety for the assignor, although such payments were made on debts past due when the assignment was executed: *Walker v. McKay*, 2 Met. (Ky.) 294; *Huse v. Ames*, 104 Mo. 91; *Nettles v. Huggins*, 8 Rich. 273.

PROMISSORY NOTES.—According to the principles governing the law of equitable setoff, the courts after insolvency have, in some cases, allowed a setoff either in favor of or against the holders of promissory notes: *Colyer v. Craig*, 11 B. Mon. 73; *Blackaby v. Sarten*, 9 B. Mon. 120; *Appeal of Farmers' etc. Bank*, 48 Pa. St. 57; *Maas v. Goodman*, 2 Hilt. 275; *Martin v. Pillsbury*, 23 Minn. 175; *Morrow v. Bright*, 20 Mo. 298; and in other cases have refused it: *Stryker v. Beckman*, 8 N. J. L. 209; *Spaulding v. Backus*, 122 Mass. 553; 23 Am. Rep. 391; *Fidelity etc. Co. v. Haines*, 78 Md. 454. Thus, the insolvency of an assignor at the date of the transfer of a note is good ground in equity to authorize a setoff by the obligor of notes due to him by the assignor at the date of the assignment acquired by purchase: *Colyer v. Craig*, 11 B. Mon. 73. In an action upon a joint note against two or more defendants the separate demand of one of them against the plaintiff may be set off against plaintiff's demand: *Blackaby v. Sarten*, 9 B. Mon. 120. A negotiable promissory note purchased for a valuable consideration, without notice that an action has been commenced on a debt due from the purchaser to the maker, and before the first publication of notice of the issuing of a warrant in insolvency against the maker, may be set off in such action when prosecuted by the maker's assignee in insolvency, even though not yet payable: *Aldrich v. Campbell*, 4 Gray, 284.

But a note not due upon the maker's insolvency cannot be set off against his debt: *Kinsey v. Ring*, 83 Wis. 536; *Martin v. Kunsmuller*, 37 N. Y. 396; *Lockwood v. Beckwith*, 6 Mich. 168; 72 Am. Dec. 69; *Keep v. Lord*, 2 Duer, 78; *Hicks v. McGroarty*, 2 Duer, 295; *Chance v. Isaacs*, 2 Edw. Ch. 348. So with one purchased after an assignment for the benefit of creditors: *Johnson v. Bloodgood*, 1 Johns. Cas. 51; 1 Am. Dec. 93. If notes are pledged

by a debtor to his creditor, as collateral security for a specific debt, the creditor, in an action against him for the conversion of the securities, cannot set off his general demand against the plaintiff, who is an assignee for the benefit of creditors: *Lane v. Bailey*, 47 Barb. 395.

PURCHASER AT VOID SHERIFF'S SALE.—If the purchaser at a sheriff's sale under a void execution is sued for trespass by the defendant in the execution, who is insolvent, he may set off the purchase money paid by him against any judgment for damages on account of the trespass, not, however, with the effect of suspending the trial of a legal issue. The court should order the equitable issue to be transferred to the equity docket, leaving the claim for damages to be tried by a jury in the ordinary action, and suspending any judgment which may be obtained therefor until the determination of the equitable issue: *Geoghegan v. Ditto*, 2 Met. (Ky.) 433; 74 Am. Dec. 413.

RAILROAD COMPANIES.—The appointment of receivers for a railroad system, and their taking possession of a leased line, does not of itself work an assignment or adoption of the lease so as to make the receivers liable for the stipulated rental. The receivers of a railroad system cannot set off as against a claim for rentals accruing to a leased line during the receivership, any cross-demands alleged to have accrued to the lessee prior to the receivership, as the two claims arose in different rights. In such a case it is immaterial that the lessor is insolvent when the lease provides for an arbitration of the matters claimed as a setoff, and expressly declares that the pendency of such arbitration shall not interfere with the operation of the lease, and that all payments and transactions under the lease shall continue exactly as if no controversy had arisen: *Farmers' Loan etc. Co. v. Northern Pac. R. R. Co.*, 58 Fed. Rep. 257. If a railroad company assigns an account due to it to one of its creditors, who sues the original debtor in the name of the company and obtains judgment, and pending such suit the original debtor pays for the company a large debt, as its surety, which debt existed previous to the assignment, and the company at the time of the assignment is insolvent, the original debtor can set off, in equity, the money paid for the company against the judgment obtained by the assignee of the account: *Tuscumbia etc. R. R. Co. v. Rhodes*, 8 Ala. 206. The company also has a right of setoff under the following circumstances: The conductor of a freight train permitted a certain person, in violation of a rule of the company, to ride on the train. Both the licensee and the conductor sustained injuries from an accident chargeable to the negligence of the company. The conductor recovered a judgment against the company in a Tennessee court for eight thousand dollars. At this time a suit brought by such licensee against the company was pending in a Mississippi court for the recovery of five thousand dollars. The company tendered three thousand dollars to the conductor, and asked that he be enjoined from enforcing the collection of the rest, so that, in case the licensee's suit should go against the company, it might charge the conductor with the amount recovered by the licensee. The conductor being insolvent, it was held that the company was entitled to the relief sought: *Railroad v. Greer*, 87 Tenn. 698.

SAVINGS BANKS.—A depositor in an insolvent savings bank, who is also a debtor to it for money borrowed, is not entitled to set off his debt against the amount of his deposit at the time when the decree of insolvency is made. The ordinary rules of setoff between debtor and creditor do not apply to the case. The bank is an agent for the depositors, receiving and

loaning their money, and its losses are their losses, and are to be borne by them equally, according to their interest: *Stockton v. Mechanics' etc. Sav. Bank*, 32 N. J. Eq. 163; *Hannon v. Williams*, 34 N. J. Eq. 255; 38 Am. Rep. 378; *Osborn v. Byrne*, 43 Conn. 155; 21 Am. Rep. 641. In an action by such a bank against two persons, upon a joint and several promissory note, the defendants cannot set off the amounts severally due them from the bank: *Barnstable Sav. Bank v. Snow*, 128 Mass. 512. If, however, a person indebted to a savings bank as a borrower deposits an amount less than the debt, intending to use the money so deposited for a payment upon the debt, he will be allowed to set off the amount deposited against the debt: *Osborn v. Byrne*, 43 Conn. 155; 21 Am. Rep. 641.

TRUSTS, ETC.—The trustee of an insolvent debtor stands, in regard to cross-demands, in the same position as the debtor himself; and, therefore, in a suit by such trustee to recover from administrators with the will annexed a legacy given to the insolvent's wife, payments made by the defendants for the insolvent are available as an equitable defense: *Krause v. Beitel*, 3 Rawle, 199; 23 Am. Dec. 113. A married woman who mortgages her separate estate for the debt of her husband acquires the rights and privileges of a surety; and, wherever the principal may claim a right of setoff in a court of equity, the surety is entitled to the same benefit. Hence, if a husband and wife unite in executing a trust deed upon his property, and also upon her separate estate, to secure the promissory note of the husband to a trust company which afterward becomes insolvent, having in its hands at the time of its failure a cash deposit of the wife, the claim of the wife, after the death of the husband, may be set off against that of the trust company, and the latter is entitled only to the difference between the two amounts: *Darby v. Freedman's etc. Co.*, 3 MacAr. 349. So, if the trustee of an insolvent debtor, under a deed of trust which leaves out certain creditors, buys property at his own trust sale at less than its value, but without any actual fraud, such trustee, in a suit by the unsecured creditors to compel a resale of the property for their benefit, is entitled to have bona fide debts due him from the trustor satisfied out of the increased price obtained by a resale of the property before the unsecured creditors can come in: *Elliot v. Pool*, 6 Jones Eq. 42. A deed of trust for the benefit of creditors vests the title of personalty in the trustee when the deed is recorded and the bond properly filed. Hence, a note given for the purchase price of chattels is not a good setoff against a demand by the maker's trustee for the benefit of creditors upon the seller for damages for wrongfully replevying the chattels after they have passed into the trustee's possession: *Fidelity etc. Co. v. Haines*, 78 Md. 454. So, if a corporation puts money in the hands of its general agent as trustee for safe-keeping and disbursement in the business, and afterward makes a general assignment for the benefit of creditors, he cannot offset a debt due him from the corporation: *First Nat. Bank v. Barnum etc. Iron Works*, 58 Mich. 124; 55 Am. Rep. 660. A demand by the United States for the proceeds of Indian trust bonds, unlawfully converted to their own use by persons who illegally procured and sold them, and afterward become wholly insolvent, is a demand arising upon an implied contract, or one which may be so treated by a waiver of the alleged fraud in the conversion of the bonds, and is therefore a proper subject of setoff by the United States to a demand made by the general assignees in insolvency of the parties who converted the bonds to their own use for the price of certain property formerly belonging to the insolvents, and by their said general assignee sold to the United States: *Allen v. United States*, 17 Wall. 207.

BLYHL v. VILLAGE OF WATERVILLE.

[57 MINNESOTA, 115.]

MUNICIPAL CORPORATIONS—STREETS AND SIDEWALKS.—It is the positive duty of a municipal corporation having exclusive control of its streets and sidewalks, and having the means within its power, to keep them in reasonably safe condition.

MUNICIPAL CORPORATIONS — LIABILITY FOR INJURIES DUE TO DEFECTIVE SIDEWALKS.—A municipal corporation is liable for an injury caused by an unsafe sidewalk, the condition of which is due to the plan adopted for its construction, where the city could have remedied the defect, but did not do so.

M. R. Everett and H. S. Gipson, for the appellant.

John Moonan and F. B. Andrews, for the respondent.

¹¹⁷ GILFILLAN, C. J. The defendant, a municipal corporation, required an owner of a lot abutting on one of its streets to construct a plank walk along the street by the side of his lot, and he constructed it on a grade given him by, and under the direction and with the approval of, defendant's street commissioner. As constructed, the walk made, at the junction of this new walk with the walk along the remainder of the block, a drop or step seven or eight inches in height. It is apparent there was no necessity or reason for having the drop, instead of gradually sloping the grade of the new walk until it came to the grade of the remainder. It is also apparent that so sloping it would have made a safe walk, and that the drop made it dangerous to one passing along it in the dark. After the walk had been in that condition for about a month, plaintiff, passing along it in the dark, hit his foot against the face of the drop, and fell, and was injured, and brings this action to recover for the injury. From a judgment after verdict in his favor the defendant appeals.

Unless the defendant is exempt from liability on the ground claimed by it as hereinafter stated, the existence of the drop in the sidewalk to the knowledge of defendant, through its street commissioner, was sufficient to make defendant's negligence a question ¹¹⁸ for the jury: *Tabor v. City of St. Paul*, 36 Minn. 188.

The defendant claims it cannot be held, because the defect in the walk was in the plan on which it was constructed; that the adoption by a municipal corporation of a plan for a public improvement is a legislative or discretionary function,

and that the corporation is not liable for the consequences of any error in the discharge of such functions.

That a municipal corporation is not liable for consequential injuries arising from the bona fide exercise of, or omission to exercise, those powers which are conferred on its council or legislative body, and the exercise of which as to the time, extent, and manner is left to the discretion or judgment of such body, has been fully recognized by this court: *Lee v. City of Minneapolis*, 22 Minn. 13; *Alden v. City of Minneapolis*, 24 Minn. 254.

Most municipal public improvements come within such powers. Thus, unless controlled by charter provisions, when street grades shall be established, and on what planes or levels; when grades shall be changed, and to what planes; when streets shall be paved, and with what kind of pavement; when sidewalks and crosswalks shall be laid, and of what material; what sewers, gutters, and catch-basins shall be made, and when and how—are usually left to the judgment or discretion of the legislative body of the corporation. And while, of course, it is expected the best results to the people of the corporation will follow the efforts of that body, it is not enjoined as a duty to produce any particular result, so that failure to bring it about will make the corporation liable for consequential injuries.

The matter of keeping streets and sidewalks in safe condition stands on a different footing. It has always been held in this state that a municipal corporation having exclusive control of its streets, when the means are within its power, has imposed on it a positive duty to keep such streets in reasonably safe condition. Scores of recoveries for injuries resulting from neglect of that duty have been sustained in this court. The first formal statement of the rule was in *Shartle v. City of Minneapolis*, 17 Minn. 308, in these words: "It is well settled that a municipal corporation having the exclusive control of the streets and bridges ¹¹⁹ within its limits, at least if the means for performing the duty are provided or placed at its disposal, is obliged to keep them in a safe condition; and, if it unreasonably neglects this duty, and injury results to any person by this neglect, the corporation is liable for the damages sustained."

In this particular there is not only a power conferred, but there is also a duty imposed, to use the power with a view to a particular result, to wit, the safe condition of the streets. Of

this duty Dillon on Municipal Corporations, fourth edition, section 1023 a, says: "Which duty is not legislative or judicial, but rather, in its nature, ministerial." It is therefore not left to the corporation's legislative body to determine when or to what extent the duty shall be performed, nor to determine it has been performed; for, if it were, it would be a discretionary, not a positive, duty.

That the safe condition of streets concerns the safety of life and limb, and not only convenience or property, is a reason for imposing a duty in respect to it greater than is imposed with respect to other matters of public improvement.

No question is made, nor can there be, on the decisions that, if a dangerous defect is due to wear, decay, accident, or the act of a third person, the corporation, upon notice of it, must seasonably repair it. In this case, if the property owner had, without authority, constructed the sidewalk with the dangerous defect, it would have been the duty of the corporation to seasonably remedy it. The corporation might adopt or ratify the plan on which the owner constructed the walk; but to hold that by so adopting or ratifying it it could avoid the duty to remedy the defect would enable it to determine whether it would perform the duty imposed on it or not, and it would cease to be a duty.

And if the corporation is not liable in case of a dangerous defect in a street or sidewalk, because the defect is in the plan previously adopted for its construction, then, although it is its duty to keep the streets in safe condition as against natural causes or the acts of third persons, it is not its duty to keep them in such condition as against its own acts. And whether it is its duty or not will depend on whether it is responsible for the unsafe condition; and if it may, without liability, determine in advance, in adopting a plan for construction, that a certain condition of the ¹²⁰ street or walk will be safe enough, we do not see upon what principle it is to be liable if, after the condition exists, from whatever cause, it determines the street or walk to be safe enough, and to need no repair.

We have not used the term "positive duty" in the sense that the corporation insures the safe condition of its streets, or that it is bound to maintain them in that condition without reference to the difficulties in the way of doing so. There may be defects that are practically irremediable. The topography of the ground may be such as to render it practically

impossible to have the streets entirely safe. In that case the people must accept such as with reasonable efforts can be provided. The law does not require of the corporation unreasonable things, but only that it shall employ, in performing its duty as to streets, the diligence, care, and skill that an ordinarily prudent person having a similar duty to perform would employ. If it do so, there is no unreasonable neglect. So far as concerns the safe condition of a street or sidewalk, the same requirement applies to adopting a plan either for its construction or repair. Of course the corporation would not be liable merely because, in the opinion of a jury, a safer or better plan might have been adopted. To illustrate: we may suppose a not uncommon case, where, owing to the character of the surface, a sidewalk must be constructed on one of two plans, each leaving it more or less unsafe—one requiring a slope so steep as to be unsafe; the other, steps that will make it unsafe. The corporation would not be liable for the dangers in the plan adopted merely because, in the opinion of a jury, the other would have been safer. To make the corporation liable, the plan adopted would have to be so much and so obviously more unsafe than the other as to show a neglect to employ the diligence, judgment, and skill in determining the plan which ordinary care would require.

We are cited to some decisions in Michigan, New York, and Pennsylvania to the effect that a corporation is not liable for the consequences of a dangerous defect in a street or walk due to the plan adopted for its construction, because it is only an error of judgment in a matter resting wholly in the judgment or discretion of the corporation. Those decisions are irreconcilable in principle with other decisions of the same courts, and inconsistent ¹²¹ with the proposition that keeping streets in reasonably safe condition is a matter of positive duty, and not of discretion.

We are therefore of opinion that the mere fact that an unsafe condition of a street is due to a defect in the plan for its construction will not shield the corporation from liability for injuries caused by such unsafe condition. There is no merit in any of the other points made by appellant.

Judgment affirmed.

CANTY, J. I agree with the result in this case and with the foregoing opinion, except that it seems to me it does not sufficiently limit the right of the courts to impeach or review the legislative judgment in adopting the plan of improve-

ment. When the alleged defect appears to be a part of the plan, it should be presumed to be of legislative, not of ministerial, origin, until the contrary is proved. The courts cannot review the legislative judgment at all. They can impeach it only when it is not legislative judgment in fact. Unless it appears that the alleged defect is of ministerial origin, it must appear that there is such gross mistake in the adoption of the plan as would imply a failure to exercise the legislative judgment. If two reasonable minds might have adopted different plans, the legislative judgment cannot be impeached for having adopted either one of these plans.

MUNICIPAL LIABILITY FOR DEFECTIVE SIDEWALKS.—A city must keep its sidewalks in good repair, and if a person is injured, without fault on his part, by its failure so to do, the city will be liable: Note to *McClure v. City of Sparta*, 36 Am. St. Rep. 927; monographic note to *Goddard v. Inhabitants of Harpswell*, 30 Am. St. Rep. 385, on the liability of cities for the negligence and other misconduct of their officers and agents. It should also be held liable if the plan adopted for the construction of the sidewalk was so manifestly dangerous that a court, upon the facts, can say as a matter of law that it was dangerous and unsafe, though it is sometimes said that while liability may exist for negligence in the execution of a plan, it cannot arise from a defect in the plan itself: See monographic note to *Goddard v. Inhabitants of Harpswell*, 30 Am. St. Rep. 387, 388.

THOEN v. ROCHE.

[57 MINNESOTA, 125.]

EVIDENCE OF COMMON REPUTE AS TO A BOUNDARY established under the United States system of surveys is competent where the monuments set in making those surveys have disappeared.

ACTION to recover possession of a strip of ground. The defendant Roche and his brother each owned a quarter section of land. The line between the two quarter sections was surveyed in 1876, and a highway laid on the line as then located. One of the brothers afterward sold his land to the plaintiff who had the land resurveyed in 1890. The original survey was found to be inaccurate, but the government quarter stake could not be located, and the plaintiff's surveyor divided the half section equally between the two parties. This gave plaintiff the strip of land in controversy. There was a verdict for the defendant, and plaintiff, Thoen, appealed from an order denying his motion for a new trial.

Taylor, Calhoun & Rhodes, for the appellant.

G. W. Stewart, for the respondent.

¹³⁸ GILFILLAN, C. J. Ejectment. The matter at issue is the location of the boundary line between the northeast quarter, owned by plaintiff, and the southeast quarter, owned by defendant, of section 31, this depending on the proper location of the quarter section post on the east side of the section established by the United States survey. As is frequently the case, that post has disappeared. It appears that, some sixteen years before the trial, one Garrison, a surveyor, made a survey of the east and west line between the north and south half sections, and, as he supposed, found where the quarter post of the United States survey had been, and set a stake there; also, that a public highway running through the town east and west was on or near the line between the north and south halves of the section.

The court below permitted, against objection, a witness who was with Garrison at the survey to answer the question, "Did you find, when you were making that survey with Mr. Garrison, the quarter post on the east side of section 31?" The answer to such a question was proper to go to the jury, for, whatever it might be worth, its value was to be tested by further examination as to details. Such posts are set with a view to their being found and recognized on future surveys, and the parties making such surveys may testify directly that they found them.

The court also admitted, against objection, evidence of common repute in the neighborhood that the stake set by Garrison located correctly the quarter section post, and also of common repute that the location of the quarter post was right in the center of the highway. The questions as put to the witnesses were general as to time, and included the time down to the trial. The general objection ¹³⁹ that it was incompetent did not point out with sufficient definiteness the objection that the questions included time after action brought. Had the attention of the court and opposite counsel been called to that objection, it might have been avoided by a slight change in the form of the questions. Where such is the case, the specific objection must be made.

There is considerable difference between the English and many American authorities in the application of the rule

which admits evidence of common repute on the question of boundaries. The English decisions confine it to cases of boundaries that are matters of public or common interest, such as boundaries of counties, towns, parishes, or manors. Many American decisions go beyond this, some going so far as to apply the rule to cases of purely private boundaries, where no one has any interest in the question but the two owners of adjoining estates. Some of those are without the support of the reason for the rule. The rule rests on necessity, better evidence of the boundary having ceased to exist, and is justified on the theory that where many persons, members of a community more or less extensive, are interested in a common boundary, they will know where it is, and their common assent will prove what they know.

Boundaries and monuments for boundaries under the United States system of surveys come within the reason for the rule, and within its application, even under the English decisions. In the first place, the establishment of such boundaries is a public act, and not merely a private act or agreement between two owners of contiguous estates. In the second place, it may, and usually does, come to affect the interest of many persons. Thus, the location of the quarter section post affects a boundary of eight quarter sections and thirty-two quarter quarter sections. And, in the third place, highways are frequently laid out and school districts may be established with reference to such boundary lines. We are therefore of opinion the evidence was competent.

The evidence as to an agreement between the plaintiff's predecessor in title and the defendant locating the line between them, and of acquiescence in, and building fences with reference to, the line so located, was not very full, but there was enough to authorize the jury in finding an agreement that would be binding within ¹⁴⁰ the rule, as stated in *Beardsley v. Crane*, 52 Minn. 537.

Order affirmed.

BUCK, J., absent, sick, took no part.

SURVEYS—EVIDENCE OF COMMON REPUTE.—Where the monuments of a survey have disappeared ancient reputation is admissible to prove the boundaries: *City of Racine v. Emerson*, 85 Wis. 80; 39 Am. St. Rep. 819, and note. After twenty-one years, the lines of a survey are conclusive as stated therein, and it is immaterial whether the marks mentioned in the survey can be found on the land or not: See monographic note to *Johnson v. Archi-*

bald, 22 Am. St. Rep. 35, on surveys. A new survey will not prevail as to the location of quarter section corners over the direct testimony of witnesses who saw the corners as located by the original survey: *Mills v. Penny*, 74 Iowa, 172; 7 Am. St. Rep. 474.

DENNIS v. JACKSON.

[57 MINNESOTA, 286.]

NEGOTIABLE INSTRUMENTS—EFFECT OF BLANK INDORSEMENT BEFORE DELIVERY.—The legal effect of a blank indorsement written on the back of a promissory note, before delivery by one not a party to the note, is to make him an absolute maker or promisor. He is an absolute surety on the note, and not a conditional one.

NEGOTIABLE INSTRUMENTS—INDORSEMENT CANNOT BE VARIED BY PAROL EVIDENCE.—The legal effect of a blank indorsement written on a promissory note, before delivery, by one not a party to the note, for the purpose of giving it credit, cannot be varied by proof of a parol agreement, made at the same time, that he was to be charged as indorser, and not as maker, though he was indorser of a prior note for which the other was substituted.

ACTION by Dennis against Jackson and Dunsmoor on a promissory note. Dunsmoor alone answered, alleging that it was agreed between him and Humphrey when he wrote his name on the back of the note that he should be regarded and treated, not as maker, but as indorser; that the note was given in renewal of one on which he was indorser, and the agreement was that he should remain on the new note in the same situation he was in upon the old note; that when the new note fell due it was not protested for nonpayment or notice given him, and that for this reason he was discharged.

C. A. Bucknam, for the appellant.

Savage and Purdy, for the respondent.

287 CANTY, J. This is an action brought on a promissory note made by the defendant Jackson to one Humphrey, and on the back of which it is alleged the defendant Dunsmoor wrote his name, before delivery to Humphrey, for the purpose of giving it credit. The complaint further alleges that before maturity Humphrey indorsed and transferred the note to plaintiff.

The answer of defendant Dunsmoor admits the making of the note, and that he wrote his name on the back of it before delivery to Humphrey, but denies that it was for the purpose of giving it credit; and alleges as a defense that this is a

renewal of a prior note, made by a third party to defendant Dunsmoor, which was secured by mortgage, ~~and~~ which note he (Dunsmoor) sold, indorsed, and delivered to Humphrey, and also assigned to him the mortgage; that this note and mortgage came due on December 20, 1889; that prior to that time, on December 2, 1889, Jackson, who had in the mean time become the owner of the mortgaged real estate, made the note in suit to Humphrey, and secured it by a new mortgage; that before the delivery of this note to Humphrey, defendant Dunsmoor indorsed it on the back of it, at the request of Humphrey to make the same indorsement on the back of the new note that he had on the old one; and at the time the note was indorsed to plaintiff he had knowledge of this fact. This answer, on motion of plaintiff, was ordered to be stricken out as sham and frivolous, and from this order Dunsmoor appeals.

We are of the opinion that the order appealed from should be affirmed. Appellant admits that he wrote his name on the back of this note before delivery. The legal effect of this was to constitute him an absolute maker or promisor, and an absolute surety on the note, and not a conditional one. He cannot vary the legal effect of his written contract by parol evidence. This applies to a blank indorsement on a note as well as it does to a contract written out in full. A defendant who signed his name on the back of a note before delivery cannot show that there was a parol agreement made at the same time that he was to be charged as indorser, and not as maker: *Peckham v. Gilman*, 7 Minn. 446. It is always competent to prove by parol the time of delivery of a written instrument, even though such proof may change the legal effect of the instrument. Thus it is competent to prove that a contract dated on Sunday was in fact made and delivered on a week day: *State v. Young*, 23 Minn. 551; *Schwab v. Rigby*, 38 Minn. 395. The date of delivery is not a part of the written instrument, but an extrinsic fact. When the time of delivery is ascertained and the instrument so delivered identified, then parol evidence cannot go further and add oral words to the written words identified. If, in a case like the present, words are to be added, the law alone must add them. The defendant's answer shows that his contract as to the second note was different from that as to the first note, and also that he signed this second note to give it credit, though in form he denies this.

289 No point is made as to whether or not this answer should have been assailed by demurrer instead of a motion to strike it out, and no point is made as to whether or not this is an appealable order, and we are not to be understood as deciding either point. Order affirmed.

BUCK, J., absent, sick, took no part.

NEGOTIABLE INSTRUMENTS—BLANK INDORSEMENT—PAROL EVIDENCE.— A third person who indorses a note in blank when executed and before delivery is, as to a subsequent bona fide holder for value, liable thereon as a joint maker: *Salisbury v. First Nat. Bank*, 37 Neb. 872; 40 Am. St. Rep. 527; but the effect of such indorsement may be varied by parol, although the general rule is that a parol contract cannot be introduced in evidence to change the legal import of a blank indorsement: *Notes to Holmes v. First Nat. Bank*, 41 Am. St. Rep. 738; *Youngberg v. Nelson*, 38 Am. St. Rep. 498.

KELLY v. MINNEAPOLIS.

[57 MINNESOTA, 294.]

MUNICIPAL CORPORATIONS—DAMAGES FOR CHANGE OF STREET GRADE.—If a city, after a railroad right of way has been acquired over a street, changes its grade, so as to make it cross over the railroad tracks on a bridge, with approaches, instead of crossing such tracks on a grade crossing, the railroad company is under no obligation to pay damages to the owners of permanent buildings abutting on such approaches caused by such change of grade. The statute creating liability for such damages imposes it on the property benefited by such change of grade.

MUNICIPAL CORPORATIONS—DAMAGES FOR CHANGE OF STREET GRADE—EFFECT OF CITY'S ASSUMING LIABILITY.—While a city may, by contract with a railroad company having a right of way over one of its streets, assume all liability, as between itself and the company, for damages caused to the owners of property by changing the grade of a street, this will not relieve the property benefited from the statutory liability for such damages, especially where the company was never liable.

MUNICIPAL CORPORATIONS—RECONSIDERATION OF VOTE ORDERING CHANGE OF STREET GRADE.—The provision of a city charter giving the city council a right, after all claims for damages caused by changing the grade of a street are filed, to reconsider the vote ordering such change, is a privilege to be exercised by the council, and the owners of the property to be taxed to pay such damages cannot claim that the special assessment upon their property is void because the city council had put itself in a position where it had no opportunity to reconsider its vote when the time to file claims for damages had expired.

STATUTES—SUBJECT OF ACT NOT EXPRESSED IN ITS TITLE.—The title of an act, entitled "An act amending section 2 of chapter 8 of the charter of the city of Minneapolis," creating liability for damages caused by a change of street grade, and providing for a special tax or assessment on

property benefited to pay the same, is sufficient, and the law is not unconstitutional because the subject thereof is not expressed in its title.

MUNICIPAL CORPORATIONS — CONSTITUTIONALITY OF ACT PROVIDING FOR SPECIAL ASSESSMENT.—The provisions of an act providing for a special assessment on the property benefited by a change of street grade are not unconstitutional because they do not give the owners of such property a right to be heard as to who shall be appointed assessors, or a right to appeal from such appointment.

MUNICIPAL CORPORATIONS — INJUNCTION — SPECIAL ASSESSMENT.—Owners of property benefited by a change of street grade, and on whom it is sought to levy a special tax or assessment to pay the damages caused by such change, have an adequate remedy given by statute to defend in the proceedings to obtain the tax judgment, and to have such judgment reviewed in the supreme court, and they cannot, therefore, restrain by injunction the proceedings to assess such special tax for benefits on the ground of irregularities in the assessment proceedings.

INJUNCTION against the city of Minneapolis and its city clerk. Judgment for the defendants.

Kitchel, Cohen & Shaw, for the appellants

David F. Simpson and L. A. Dunn, for the respondents.

295 CANTY, J. This is an appeal from an order denying plaintiffs' motion for a new trial in an action brought to enjoin the city of Minneapolis from assessing and collecting a special assessment of taxes on the property of the plaintiffs for benefits to their property in changing the grade of Fifth street north in said city, where it approaches and crosses over the tracks of the Great Northern Railway **296** Company (formerly St. Paul, Minneapolis & Manitoba Railway Company) and the Minneapolis & St. Louis Railway Company. This street was laid out as a public street before these railway companies acquired their rights of way. Their charters each provide, in substance, that the railway company shall have the right to construct its tracks across any such street, but that it shall restore the street to such condition and state of repair as not to impair or interfere with its free and proper use. This and other parallel streets crossed these tracks formerly on grade, and the city instituted mandamus proceedings to compel these companies to lower their tracks, and carry these streets over them. The construction of these charter provisions and the history of these proceedings may be found in the cases of *State v. St. Paul etc. Ry. Co.*, 35 Minn. 131, 59 Am. Rep. 313, 38 Minn. 246, and *State v. Minneapolis etc. Ry. Co.*, 39 Minn. 219. But, after the last of these cases was decided, and while it was pending in the United

States supreme court on writ of error, it was stipulated by all the parties to it that such writ should be dismissed, and the final judgment in the district court in that proceeding should be modified so that the tracks should be lowered less, and the grade of the street at the crossings and approaches accordingly raised more, and the approaches made consequently longer. The city further stipulated that it "assumes all liabilities for damages to the property of adjoining owners under the provisions of its charter, by reason of the change of the grade" in the streets, "made necessary by the building of the approaches to the bridges on said streets, the same as though the said city were itself doing the actual work of constructing said approaches in accordance with said change of grade." The final judgment was modified pursuant to this stipulation, and the railroad companies proceeded accordingly, lowered their tracks, and built the bridges over them, and the approaches to these bridges at each end of the same. These approaches on Fifth street were partly filled in prior to September 1, 1891, when the city council voted to change the grade of Fifth street to the grade stipulated, and the approaches were afterward completed by the railroad companies to conform to this grade. By an amendment (Special Laws of 1885, c. 5) to the city charter it is provided that when any permanent building has been constructed, ²⁹⁷ abutting on any street, after the grade has been once established, and the city council afterward votes to change such grade, the owner of such building may, within twenty days thereafter, file objections stating his claim for damages; that unless the city council, within a certain time thereafter, reconsiders its vote, it shall appoint five freeholders to ascertain the amount of damages to such buildings, caused by reason of such change of grade, and award compensation therefor, and also assess the amount of such compensation upon the property to be benefited by such change of grade, and report all of the same to the city council, who may confirm the same, or refer it back to the same or another commission.

Such claims were filed for the change in grade of Fifth street, and such a commission was appointed. They assessed the damages to the permanent buildings thus damaged in the sum of twenty thousand dollars in the aggregate, and awarded that amount as compensation to the owners of such buildings, and assessed or levied the amount so awarded against the lands and premises of these plaintiffs and others

as benefits which they would receive by such change in grade, and hence this suit.

1. On the authority of *State v. St. Paul etc. Ry. Co.*, 35 Minn. 131, 59 Am. Rep. 313, appellants claim that the obligation to pay these damages rested on the railway companies. That case does not so hold. It holds that it was their duty to restore the crossing, and where, to accomplish this, it was necessary to build approaches, it was their duty to build them; and if, in the prosecution of the work, it became necessary to encroach upon private property, that they had the power of eminent domain, and should, at their own expense, acquire the rights necessary in order to restore the crossing.

Neither are the cases of *Robinson v. Great Northern Ry. Co.*, 48 Minn. 445, and *Parker v. Truesdale*, 54 Minn. 241, decisive of the question of the liability of the property benefited to pay the damages here awarded, as claimed by respondent and held by the court below. In those cases the owners of property abutting on the approaches brought suit against the railroad companies for damages resulting from the change of grade. As to those cases, it is only necessary to suggest that the right to damages for a change of the grade of a street is purely a creature ²⁹⁸ of statute, and the mode of procedure provided by the statute for the recovery of the damages is exclusive. The railroad company, in doing the work of making the change of grade, was acting for the city, and under its authority and rights. Then it necessarily follows that, if such abutting owner could not maintain a suit against the city for damages, he could not against the railroad company. He could only follow the exclusive remedy given him by the statute. But these plaintiffs are not in that position. They do not stand upon the statute for their rights, while repudiating it for their remedy; they do not stand upon or claim under this statute at all.

We are of the opinion that the railroad companies were not primarily liable for the damages to abutting owners resulting from the change of grade of the street. The right to such damages is one that did not exist when the railroad charters were granted. Then the obligation to pay such damages was not a charter obligation. Whether or not the legislature could, since it granted the charters, and the companies accepted and acted upon them, have imposed this obligation on the companies, it is not necessary to consider.

It is sufficient to say that the legislature has not imposed it on the companies, but on the property benefited.

It is true that the court and the city, if they had both so decided, could have compelled the companies to lower their tracks so low as to run under the street without any change of the street grade. But the object to be attained was not the preservation of the then existing street grade, or the exemption of these plaintiffs from liability for these statutory damages, but the restoration of the street, not to as good a condition as if the railroads did not run there, but to such a condition as was reasonable and proper, under all the circumstances—to such a condition as not “to interfere with its free and proper use.” The city and the court decided what this reasonable and proper condition was to which the street should be restored. It is immaterial whether one or the other, or both, ultimately so decided. As far as these plaintiffs are concerned, they are conclusively bound by the result, and cannot be heard to say that there was no public necessity for the change of grade. If an incident of that result is to throw these statutory damages upon them, that is their misfortune.

299 2. It is also claimed that the city assumed the liability for these damages in its contract of settlement with the railroad companies, and that, therefore, it has become a liability of the city at large, and the damages should be paid out of the general funds. If the railroad companies were never liable for these damages, the contract of the city can hardly be construed as anything more than a contract to save the companies harmless. The city is the agent of and represents its wards, districts, and inhabitants in such public matters, and a contract by it, assuming their obligations, cannot be construed as a contract assuming the obligations of third parties, which, as between them and the city, relieves them from liability.

3. It is further claimed by appellants that this special assessment upon their property is void because the city council had put itself in a position where it had no opportunity to reconsider its vote when the time to file claims for damages had expired. The charter provides that the council may at that time reconsider its vote if, from the amount of damages claimed, it deems it unwise to make the change of grade. This right to rescind the proceedings is in the nature of a

privilege to be exercised by the city council. The statute does not say that the work of grading shall not be commenced before the time to rescind expires, and it is in the discretion of the council how far it will proceed before the time to reconsider arrives. Whether or not the change is apparently unwise, and the damages likely to be so great and oppressive to those assessed to pay them as to make it an abuse of discretion for the council to proceed until the claims for damages have all been filed, and as to whether or not, in such a case, the court would grant relief, and as to whether or not the application should be made promptly before expense is incurred in carrying out the work, are all questions which it is not necessary here to consider. Neither the agreement with the railroad companies nor the prosecution of the work before the time to reconsider arrived destroys the validity of the assessment proceedings.

4. The charter of Minneapolis, chapter 8, section 9, provides that bridges crossing railroad tracks and the approaches thereto, when not chargeable to the railway companies, shall be built and maintained by the city as a general city charge. The appellants cite this as showing that these damages are a general city charge. Other parts of this section provide that the grading of streets shall, except as above provided, be a ~~300~~ ward charge. The section applies merely to the grading of streets and the keeping of them in repair, and not to the establishing of grades, or the changing of grades once established, or the payment of damages therefor, which is all provided for by the Special Laws of 1885, chapter 5, amending section 2 of this chapter 8.

5. Appellants claim that said chapter 5 of the Special Laws of 1885 is unconstitutional, because the subject of the act is not expressed in the title. The title to the act is "An act amending section 2 of chapter 8 of the charter of the city of Minneapolis." The title is sufficient: *State v. Madson*, 43 Minn. 438; *Willis v. Mabon*, 48 Minn. 140; 81 Am. St. Rep. 626.

6. Appellants claim that the statute authorizing these assessments is unconstitutional, because the parties whose property is assessed have no opportunity to be heard as to who shall be appointed on the assessing commission, and no appeal is allowed in which a new commission may be appointed by the court after hearing. It is well settled that, as against the state, property owners have no such constitutional rights,

whether the assessment is of some regular tax for general purposes upon the regular tax districts, or of some special tax for a special purpose upon the district specially benefited: *Hennepin County v. Bartleson*, 37 Minn. 343; *Carpenter v. City of St. Paul*, 23 Minn. 232; *State v. District Court of Ramsey County*, 33 Minn. 295; *City of St. Paul v. Rogers*, 22 Minn. 494.

7. Appellants further claim that the tax districts designated by the commissioners are too small; that a large area of the city was benefited by, and should be assessed for, these improvements; that the boundaries of the district are arbitrarily fixed; and that property within the district has been omitted which should be assessed. It may be well to remark that the size and shape of the tax districts might properly have been influenced, to some extent, by the fact that similar improvements were at the same time being made on Third and Fourth streets, and were, by the mandamus proceedings, provided for on Seventh street, all of which, as well as the improvements on this street, will connect North Minneapolis with the southern part of the city.

But injunction will not lie to restrain tax proceedings when there is an adequate remedy provided by the statute. It has been held ³⁰¹ that certiorari will not lie to the board making such an assessment to review such errors; that the only remedies for reviewing the acts of the assessing board are the right given to defend in the proceedings to obtain the tax judgment, and the remedies allowed for reviewing that tax judgment in this court: *State v. Board of Public Works*, 27 Minn. 442.

If the assessment proceedings cannot, prior to the final determination and entry of the tax judgment, be reviewed for such errors by the direct proceeding of certiorari, how can such proceedings for such errors be attacked collaterally by injunction? The other assignments of error have no merit.

This disposes of the case, and the order of the court below should be affirmed. So ordered.

BUCK, J., absent, sick, took no part.

MUNICIPAL CORPORATIONS—DAMAGES FOR CHANGE OF STREET GRADE.— When the right to compensation for a change of grade is given by statute, the adjoining property owner is entitled to damages, if injured by the change, whether the work is negligently done or not; but, to entitle him to recover, he must show some substantial injury peculiar to himself alone,

and not suffered by the public in general: See monographic note to *O'Brien v. Philadelphia*, 30 Am. St. Rep. 848, on liability of cities for a change of grade of streets.

STATUTES—SUBJECT OF ACT NOT EXPRESSED IN TITLE.—An amendatory act which merely recites in its caption the title of the act sought to be amended, without enlarging its scope, is constitutional and valid, provided its purview is germane to the title of the original act: *Philadelphia v. Ridge Avenue Ry. Co.*, 142 Pa. St. 484; 24 Am. St. Rep. 512.

MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENTS—INJUNCTION.—The expense of local improvements in a town or city may be met by local assessments, in whole or in part, and equity will not enjoin the collection of such assessments except under special circumstances, such as leave the complainant without any remedy at law, and bring his case under some of the recognized heads of equity jurisdiction, or where it is clear that the tax has been imposed without authority and is absolutely void: *Murphy v. Mayor etc. of Wilmington*, 6 Houst. 108; 22 Am. St. Rep. 345. Assessments for the improvement of streets may be made against the property peculiarly benefited, but to the extent only of such peculiar benefits: Note to *Mauldin v. City Council*, 46 Am. St. Rep. 734; monographic note to *New Orleans v. Telephone etc. Co.*, 8 Am. St. Rep. 509, on what is a tax, and what impositions may be sustained as an exercise of the taxing power. The collection of an assessment will not be enjoined unless some special reason is shown for equitable interference: See monographic note to *Holland v. Mayor*, 69 Am. Dec. 199, on injunctions to restrain collection of taxes and assessments. Proceedings for street improvements require notice and hearing where the cost of such improvement is to be apportioned among those benefited; but it is sufficient if ample opportunity is afforded, during the enforcement of such proceedings, to inquire fully into the legality and amount of the assessment levied: *Garvin v. Dausseman*, 114 Ind. 429; 5 Am. St. Rep. 637.

CROOKSTON IMPROVEMENT CO. v. MARSHALL.

[57 MINNESOTA, 833.]

DEEDS—EVIDENCE TO REFORM.—One who seeks to have a deed reformed on the ground that it includes land not intended to be conveyed must establish his case by clear, satisfactory, and convincing proof. A mere preponderance of evidence is not sufficient.

DEEDS—REFORMATION OF, FOR MUTUAL MISTAKE OF FACT.—Though the terms of a deed are stated according to the intent of both parties, yet if they use the description they do because of their mistake in respect to the land to which that description applies, this is a mistake of fact justifying a reformation of the deed.

DEED—REFORMATION OF, FOR MUTUAL MISTAKE OF FACT—ILLUSTRATION.—If a piece of unplatted land known as lot 4 lies east of lots 6 and 7, which last two lots are platted and constitute a town addition, having dwelling-houses upon them, but the plat laps over from forty to seventy-five feet eastward upon lot 4, which is conveyed by deed and described as lot 4, the parties being ignorant of the fact of overlapping and supposing that the west line of the unplatted land is the west line of lot 4, and

the evidence is strong that what the grantor agreed and intended to convey was the unplatted portion of the land, the deed may be reformed so as to except therefrom the strip along the west line of lot 4.

DEEDS—REFORMATION OF, FOR MISTAKE ACCOMPANIED BY FRAUD.—The mistake of a grantor, if known to the grantee, who conceals the truth from the grantor in order to secure a conveyance of land from him which he knows the grantor never intended or agreed to convey, is a case of a mistake of one party, accompanied by fraud or inequitable conduct of the other party, and is good ground for a reformation of the instrument.

ACTION to reform a deed. The plaintiff, the improvement company, conveyed lot 4, mentioned in the opinion, to the defendants, Marshall and others, not knowing at the time that the platted town lots overlapped upon the western boundary of lot 4. Upon discovering this fact the improvement company brought an action to reform the deed so as to except therefrom the strip along the west line of lot 4, covered by the town lots, claiming that on the sale its agent, Sampson, pointed out on the ground to the defendant's agent, Munch, the land intended to be conveyed as about eleven acres in the elbow of the Red Lake river, between the platted town lots and the river, and that stakes, fences, and improvements marked the line between the platted addition and the unplatted land to the east. There was a judgment for the plaintiff and the defendants appealed from an order denying their motion for a new trial.

A. A. Miller, for the appellants.

H. Steenerson, for the respondent.

336 MITCHELL, J. The only question in this case is, whether the evidence justified the decision of the trial court that plaintiff was entitled to a reformation of its deed to defendants, having in mind the rule that to entitle a party to such relief the proofs must be clear, satisfactory, and convincing—that a mere preponderance of evidence will not suffice.

One Bjornstad (plaintiff's grantor) owned government lots 6 and 7 in section 25, and lot 4 in section 30, lot 4 lying immediately east of lots 6 and 7. He platted Sampson's Woodland addition to Crookston as on lots 6 and 7, the east line of the addition being supposed and intended to be the line between those lots and lot 4, but, as staked out on the ground, the plat in fact extended, as has since been ascertained, from forty to seventy-five feet eastward over upon lot 4. When the survey was made, stakes were stuck at the corners of the

lots and blocks, including those on the east line of the plat. What was east of the platted portion was marked "Reserved for 337 Park," and was supposed to comprise the whole of lot 4. All of this property, both platted and unplatted, was subsequently conveyed to defendant, which had, prior to the deed in controversy, conveyed several of the lots on the east side of the plat to various parties, who had erected houses and made other improvements thereon.

The transaction between the parties to this suit was entirely conducted on behalf of the plaintiff by one Sampson, its president, and on behalf of the defendants by one Munch.

The evidence is very strong to the effect that what Sampson agreed and intended to convey was the unplatted portion of the land, he supposing that its west line was the west line of lot 4, or substantially so; that he so informed Munch, and pointed out to him the stakes on the east side of the plat as being the line of the land proposed to be sold and conveyed. Under this condition of things the deed was executed describing the premises as lot 4, which, for the reasons stated, includes from forty to seventy-five feet of the platted ground. It is true the terms of the deed are stated according to the intent of both parties, but there was a mistake of both (taking the view of the facts most charitable toward Munch) in respect of the thing to which those terms applied, to wit, boundary.

What was intended was to convey the unplatted, and not any part of the platted, land, and they used the description they did because of their mistake in supposing that the west line of the unplatted land was the west line of lot 4. This was a mistake of fact which would justify a reformation of the deed: 2 Pomeroy's Equity Jurisprudence, sec. 853. The only other hypothesis is that Sampson was laboring under the mistake, and that Munch, knowing that fact, concealed the truth from him in order to secure a conveyance of land which he knew Sampson never intended or agreed to convey. This would be a case of a mistake of one party accompanied by fraud or inequitable conduct of the other party, which is also good ground for reformation of a written instrument: 3 Pomeroy's Equity Jurisprudence, sec. 1376.

Had the agreement been to convey lot 4, and had there been merely a mutual mistake as to its boundaries, this would have constituted no ground for a reformation of the deed. But, assuming the presence of good faith on the part

of Munch, it seems to us that there was ample proof of mutual mistake; that is, that there was ³³⁸ a meeting of the minds of both parties—an agreement actually entered into—that it was the unplatted land that was to be conveyed, but that they used the description they did because of a mistake in respect to the land to which that description applied. With knowledge of the existence of the improvements made by plaintiff's grantees on several of the lots on the east side of the plat, it is hardly possible that Munch could have honestly believed that he was buying or that Sampson intended to sell those lots.

Order affirmed.

BUCK, J., absent, sick, took no part.

REFORMATION OF DEEDS.—A deed will be reformed for mistake of fact only upon clear, satisfactory, and convincing evidence of the mistake: *Turner v. Shaw*, 96 Mo. 22; 9 Am. St. Rep. 319, and note; but this rule does not extend to mistakes of law, or to mistakes in the intention of one only of the parties without fraud in the other: *Ruffner v. McConnel*, 17 Ill. 212; 63 Am. Dec. 362. The rule does apply, however, where the other party is guilty of fraud: *Harding v. Long*, 103 N. C. 1; 14 Am. St. Rep. 775. It is the rule of evidence where it is sought to reform a deed so as to make it include land claimed to have been omitted therefrom by mistake: *Turner v. Shaw*, 96 Mo. 22; 9 Am. St. Rep. 319. A deed conveying too much land may also be reformed for mistake: *Gillespie v. Moon*, 2 Johns. Ch. 585; 7 Am. Dec. 559; and no distinction exists between the principles governing such a case and one where the deed, by mistake, omits to convey land intended to be conveyed: Note to *Elder v. Elder*, 25 Am. Dec. 212.

CLEGHORN v. MINNESOTA TITLE INSURANCE AND TRUST COMPANY.

[57 MINNESOTA, 341.]

PLEDGE.—COMMERCIAL PAPER PLEDGED AS COLLATERAL CANNOT BE SOLD at either public or private sale, without an express agreement to that effect.

PLEDGE—JUDICIAL SALE OF.—A court of equity may, under special circumstances, order a judicial sale of commercial paper pledged as collateral. Thus, if the pledgor of a note having four years to run becomes insolvent, makes an assignment for the benefit of creditors, and the pledgee proves his claim in the insolvency proceedings, there should be a judicial sale of the note, so that the estate of the insolvent may be settled without waiting for the note to mature.

ACTION to obtain a decree for the judicial sale of a pledge. On October 13, 1892, the defendant, Whitney, was indebted

to the plaintiff, Cleghorn, in the sum of six thousand dollars and interest, past due. Whitney, at that time, held a note and mortgage against one George S. Bicknell for seven thousand dollars, dated August 25, 1892, due in five years, and bearing six per cent interest. Whitney assigned the note and mortgage to the plaintiff as collateral security. On June 28, 1893, Whitney, being insolvent, made an assignment to the defendant, the Minnesota Title Insurance and Trust Company, of all his nonexempt property in trust for his creditors, and it accepted the trust. Plaintiff filed his claim with the assignee on October 25, 1893, with a notification that he intended to exhaust his collateral security and look to the assigned estate for any deficiency. Plaintiff then brought an action, stating these facts in his complaint, and asked judgment against Whitney for six thousand dollars and interest; that the note and mortgage be sold by the sheriff at public auction; that the proceeds be applied upon the judgment, and that any deficiency be allowed as a claim against Whitney's estate. The trust company demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was overruled and the company appealed.

William B. McIntyre, for the appellant.

Henry J. Fletcher, for the respondent.

344 MITCHELL, J. The rule of law undoubtedly is, that without express agreement to the contrary, commercial paper pledged as collateral cannot be sold by the pledgee at either public or private sale. The reason for this is, that such paper has no market value, and, consequently, if exposed for sale, would be liable to be sacrificed. But the question of the right of a pledgee to come into court and have a decree for a judicial sale of the pledge is an entirely different question. This was always a well-recognized head of equitable jurisdiction even where the pledgee or mortgagee had a right to sell the property. The sale being under the direction and control of the court it has the power, as it is its duty, to see to it that the property shall not be sacrificed; and hence such a sale is not liable to the evils or abuses to which a sale by a party himself is subject. Just when and under what circumstances a court would or should order a sale of commercial paper or other collateral of similar character it is not necessary to consider. The right to do so, at least under

special circumstances, is undoubted: Pomeroy's Equity Jurisprudence, secs. 164, 1231; Daniell on Negotiable Instruments, sec. 833; Jones on Pledges, sec. 655; *Donohoe v. Gamble*, 38 Cal. 340; 99 Am. Dec. 399.

In the present case the collateral note had some four years to run before it matured. The pledgor had become insolvent, and had made a general assignment for the benefit of all his creditors. The plaintiff had proved his claim in the insolvency proceedings, and had claimed, as he might, the right to participate in the benefits of the assignment in case the pledged property proved insufficient to satisfy his claim in full. Hence, unless the collateral should be sold, the final settlement of the estate of the insolvent would be postponed for several years. These facts made a proper case, even under the strictest rule, for a judicial sale of the collateral note.

Counsel for defendant argues that the pledge was made under a contract, implied by law, that the paper should not be sold, but that ³⁴⁵ the plaintiff should wait until its maturity, and then collect it in the ordinary way, and that a court has no power to change the contract of the parties. There is nothing in this point. The question is one of remedy, rather than of contract right; and if the law as to the manner of realizing on the collateral is to be deemed to have entered into and become a part of the contract, this would be as applicable to the rule which authorizes a judicial sale as it is to the rule which forbids the pledgee himself to sell.

Order affirmed.

BUCK and CANTY, JJ., took no part.

PLEDGE—SALE—JUDICIAL SALE.—At common law a pledge could not be sold, except under a judicial decree, in the absence of a special agreement to the contrary: See monographic note to *Robinson v. Hurley*, 79 Am. Dec. 503, on pledges; *Jeanes' Appeal*, 116 Pa. St. 573; 2 Am. St. Rep. 624. The pledgee of commercial paper may obtain its sale by a decree in equity, and may bring suit before the debt secured is due. Negotiable instruments may be thus sold, and if the maker of such an instrument resides in a remote country, or in a different state, and it is not shown that he has any property subject to seizure and sale within the jurisdiction of the forum, such special circumstances are presented as to authorize the holder of the instrument given in pledge to resort to a court of equity for a foreclosure and sale: See monographic note to *Robinson v. Hurley*, 79 Am. Dec. 504, 505; *Donohoe v. Gamble*, 38 Cal. 341; 99 Am. Dec. 399.

DAVISON v. SHERBURNE.

[57 MINNESOTA, 355.]

PARTNERSHIP—STATUS OF PARTNERS AFTER DISSOLUTION.—A firm, even after dissolution, are still partners as to those with whom they have previously dealt as partners, and who have no notice or knowledge of the dissolution, and may bind each other in matters within the scope of the partnership business..

PARTNERSHIP—EFFECT OF PARTIAL PAYMENT BY ONE PARTNER AFTER DISSOLUTION OF FIRM.—A partial payment of a partnership debt, made by one of the firm after dissolution, will prevent the bar of the statute of limitations as to the other partners, in favor of a creditor who has had dealings with the firm and no notice of its dissolution.

DEPOSITIONS—ERROR IN ADMITTING.—It is reversible error to admit in evidence a deposition, without a showing by the party wishing to use it that a statutory ground existed, and still exists, for taking it.

ACTION on a promissory note. On December 17, 1881, Elijah A. Harmon and Charles K. Sherburne were partners in the grocery and crockery business at Minneapolis, under the firm name E. A. Harmon & Co. On that day they borrowed two thousand two hundred and twenty-one dollars of the plaintiff, Suviah T. Davison, of Hartford, Connecticut, and used it in liquidation of the partnership business. They gave a note for the amount, due in three years thereafter. It was not signed with the firm name, but with the individual names of the two partners. Harmon was a relative of the plaintiff, and she did the business by correspondence with him. At various times Harmon paid the interest on the note down to December 17, 1889. The defendant, Sherburne, claimed in his answer, and his evidence on the trial tended to prove, that the firm was dissolved in June, 1881; that the note to plaintiff was the individual note of the defendants, and was given in settlement of Harmon's individual debt to her, and that as to the defendant, Sherburne, the statute of limitations barred a recovery. The plaintiff offered in evidence on the trial in June, 1893, Harmon's deposition taken on December 17, 1892, at his residence at Minneapolis, on notice to Sherburne. The admission of this deposition in evidence was objected to by Sherburne on the ground that it did not appear that Harmon was not then in the city and could not be procured. The objection was overruled and Sherburne excepted. The deposition was read in evidence. There was a verdict in the sum of two thousand seven hundred and sixty dollars and forty-seven cents for the plaintiff,

and the defendant, Sherburne, appealed from an order overruling his motion for a new trial.

A. Ueland, for the appellant.

Reed & Dougherty, for the respondent.

³⁵⁸ MITCHELL, J. We are inclined to the opinion that the question whether the note in suit was executed during the existence of the copartnership between defendants, and for partnership purposes, was for the jury; although it must be admitted that the evidence tended very strongly to show that the partnership was dissolved the previous June, when it sold out its mercantile business, and that thereafter it existed only for the purpose of winding up, by collecting and distributing its assets and paying its debts.

The fact that the note was signed by defendants in their individual names, and not in the firm name, although an item of evidence of some weight, was not controlling or conclusive.

There was, however, ample evidence to justify, if not to require, ³⁵⁹ a finding that the partnership was dissolved prior to 1886, the date of the first payment on the note relied on to prevent the bar of the statute of limitations. The note is confessedly barred as to Sherburne, unless taken out of the statute by payments made by Harmon; and there is evidence that plaintiff had no notice or knowledge of the dissolution of the partnership when these payments were received, and but for them the note would have been barred.

This state of facts presents the principal legal question in the case, viz., whether a partial payment by one of the firm that contracted the debt, made after dissolution of the partnership, will prevent the bar of the statute as to the other partners, in favor of a creditor who has had dealings with the firm, and has had no notice of its dissolution.

It is the settled law of this state that one of several joint debtors cannot, from the mere fact of the existence of a joint liability, by his own several act or agreement, extend or renew the liability as against his co-obligors: *Willoughby v. Irish*, 35 Minn. 63; 59 Am. Rep. 297.

The power of one partner to bind the others rests upon the principle that each partner is, in contemplation of law, the general and accredited agent of the whole firm in all matters within the scope of the partnership business; and it follows that this power terminates with the dissolution of the copartnership.

And many cases can be found which contain the general and unqualified statement that an acknowledgment of a partnership debt by one partner after dissolution will not prevent the statute from running as to the other partners.

These statements are usually based on the want of authority, which terminates with dissolution. In most of these cases it will be found that the creditor had notice of the dissolution, and, as applied to such a state of facts, the statement is undoubtedly correct. But in some instances it would seem that the court had not presently in mind the important fact that, under some circumstances, notice of dissolution is necessary to terminate the partnership as to third parties, or, more accurately speaking, to terminate the power of one partner to bind the others. This is frequently illustrated by cases where those who have had previous dealings with the firm give new credits to the firm without notice of its dissolution. It is said ³⁶⁰ in such cases that the person has parted with something of value on the credit of the firm, whereas in the case of a part payment of an existing partnership debt the creditor parts with nothing, but in fact receives something.

It seems to us that this is more plausible than sound. We cannot see that the equity of one who sells goods on the credit of a firm which he supposes still to exist is any stronger than that of a creditor who, having no knowledge of the dissolution, has refrained from reducing his claim to judgment, in reliance on part payments as a protection from the statute.

We think that, upon principle as well as authority, the correct rules are as follows: As between themselves, neither partner after dissolution has any power to act for or bind the other. Neither are they capable of doing so with respect to others with whom the firm had previous dealings, who had received notice of the dissolution; nor with respect to those with whom they had not previously dealt as partners at least after public notice of dissolution, if at all. But with respect to those with whom they had previously dealt as partners, and who had not notice or knowledge of the dissolution, they are still, in the eye of the law, partners, capable of binding one another in matters within the scope of the partnership business. Within the principle of this last proposition, a partial payment by a partner after dissolution of the firm will prevent the bar of the statute as to the other partners, in favor of a creditor who has had dealings with the firm, and

has had no notice of its dissolution: *Kenniston v. Avery*, 16 N. H. 117; *Tappan v. Kimball*, 30 N. H. 136; *Sage v. Ensign*, 2 Allen, 245; *Buxton v. Edwards*, 134 Mass. 567; *Gates v. Fisk*, 45 Mich. 522; *Clement v. Clement*, 69 Wis. 599; 2 Am. St. Rep. 760. See, also, *Leithauser v. Baumeister*, 47 Minn. 151; 28 Am. St. Rep. 336.

Counsel for appellant is in error in saying that these authorities are from jurisdictions committed to the doctrine of *Whitcomb v. Whiting*, 2 Doug. 652, that a payment of one joint debtor will prevent the bar of the statute as to the others. Most, if not all, of them are from states where, either by statute or by judicial decision, the law is the same as laid down in *Willoughby v. Irish*, 35 Minn. 63; 59 Am. Rep. 297. We have found no case to the contrary, except *Tate v. Clements*, 16 Fla. 339, 26 Am. Rep. 709, where the question was directly involved, and presently in the mind ³⁶¹ of the court. We are therefore of opinion that the charge of the court was a correct exposition of the law.

But, according to the doctrine of *Atkinson v. Nash*, 56 Minn. 472, the court erred in admitting the deposition of Harmon, taken pursuant to the general statutes of 1878, chapter 73, section 36, as amended by the Laws of 1885, chapter 53, there being no showing that a cause existed and still exists for taking and using the same. We do not think the record justifies the contention of respondent's counsel that appellant's counsel accepted his statement on the trial that Harmon was "not in the city" as a sufficient showing. For this error, the order denying a new trial is reversed.

BUCK, and CANTY, JJ., took no part.

PARTNERSHIP—STATUS OF PARTNERS AFTER DISSOLUTION—PART PAYMENT, EFFECT OF.—After dissolution each member of a partnership has the same authority as before to represent his firm in all acts necessary to complete business which was unfinished at the time of the dissolution, and those who dealt with the firm before dissolution are entitled to hold all the partners liable for debts contracted afterward in good faith in the belief that the firm still continued. As to such customers actual notice is required to exempt from liability any member of the firm, though he has retired therefrom: See monographic note to *Gilmore v. Ham*, 40 Am. St. Rep. 568, 573. All partners are bound on a firm note, if a promise to pay, a partial payment, or an acknowledgment of the note is made by one of them after the dissolution of the firm, but within the period of the statute of limitations, and the holder of the note at the time of its execution has no notice of the dissolution of the firm. Part payment of a firm note by one of the partners before the statute of limitations has attached, though after dissolution of

the firm, of which the payee has no notice, forms a new point, from which the statute begins to run as to all the partners: *Clement v. Clement*, 69 Wis. 599; 2 Am. St. Rep. 760.

DEPOSITION—BASIS FOR ADMISSION OF.—Depositions are admissible by force only of statutes under which they are allowed to be taken, and are inadmissible unless there has been a full compliance with the actual and positive requirements of the law: *Simpson v. Carleton*, 1 Allen, 109; 79 Am. Dec. 707. Some cases hold that a deposition is inadmissible where the witness is living, without proving his inability to attend court: *Jackson v. Rice*, 3 Wend. 180; 20 Am. Dec. 683; *Gordon v. Little*, 8 Serg. & R. 533; 11 Am. Dec. 632; others, that, if it is properly taken a short time before the trial on the ground that the witness is about to depart from the jurisdiction of the court, they may be admitted in evidence without proof that he cannot be brought to testify in person; and that the party objecting to the use of the deposition must show that the presence of the witness could have been procured at the trial: *Hennessey v. Niagara Fire Ins. Co.*, 8 Wash. 91; 40 Am. St. Rep. 892. The deposition may be admitted without any showing that the oral testimony of the witness could not be procured if no objection was urged against it for this reason, and the reasons given for the objection that was urged were insufficient: *Missouri Pac. Ry. Co. v. Newwanger*, 41 Kan. 621; 13 Am. St. Rep. 304.

DAVIS v. CROOKSTON WATER WORKS, POWER, AND LIGHT COMPANY.

[57 MINNESOTA, 402.]

MECHANIC'S LIEN—EFFECT OF ASSIGNING CLAIM AS COLLATERAL SECURITY.

Though one entitled to a mechanic's lien assigns the sum due him to another as collateral security for the payment of a debt, he still has sufficient interest to entitle him to file a lien statement afterward within the statutory time, which will secure his equitable rights in the claim assigned, and also inure to the benefit of his assignee.

MECHANIC'S LIEN—EFFECT OF ABSOLUTE ASSIGNMENT OF CLAIM.—If one entitled to a mechanic's lien makes an absolute assignment of the sum due him, and not merely as security, a lien statement filed by him on his own account after such assignment, though within the statutory time, is void, and will not, therefore, inure to the benefit of his assignee.

EVIDENCE.—IT MAY BE SHOWN BY PAROL that an instrument absolute on its face was intended merely as security for the payment of a debt.

EVIDENCE.—IT MAY BE SHOWN BY ORAL EVIDENCE that a written assignment, absolute in form, by a mechanic's lien claimant, of the sum due him was in fact intended merely as security.

CONTRACTS—DELAY IN PERFORMANCE—STIPULATED DAMAGES.—A stipulation in a contract, to be performed on or before a day named, that a certain sum per day shall be paid for each day's delay thereafter does not apply if the delay is caused by the failure of the other party to the contract to perform on his part.

ACTION by the plaintiff, Davis, to foreclose a mechanic's lien. Hugh Thompson intervened. The substance of the findings of fact numbered from 17 to 21, inclusive, and the third subdivision of the conclusions of law mentioned in the opinion, was that Nolan and Davis made and filed a lien statement claiming a lien for seven thousand and fifty-two dollars and twenty-seven cents on the power-house of defendant; that Nolan assigned his interest therein to Davis, and that Davis assigned the entire demand absolutely to Thompson.

R. J. Montague and W. F. McNally, for the appellant.

H. Steenerson, for the plaintiff, Davis.

E. M. Stanton, for the intervenor, Thompson.

⁴⁰⁴ CANTY, J. This is an action commenced by plaintiff to foreclose a mechanic's lien. Plaintiff alleged that he and one Nolan entered into a contract with defendant to erect a power-house for it at Crookston, and furnish a part of the material for the same; that they performed the contract, and filed the lien statement within the statutory time; and that afterward Nolan assigned all his right and interest therein to plaintiff. The defendant answered, and, among other things, alleged that, before the commencement of this action, the plaintiff and Nolan assigned this claim and demand to Thompson, and that plaintiff had no right or interest therein. The answer did not allege that this assignment was made before the lien statement was filed.

Thompson intervened, and alleged an assignment to him by plaintiff and Nolan, before the completion of the work, of all the sums earned, and to be earned by them, under the contract, and demanded judgment in his favor for the sum claimed to be due. The cause was tried before the court without a jury. The court found for the intervenor, and ordered judgment declaring the sum found due a lien on the premises, and ordered the same to be foreclosed and sold ⁴⁰⁵ to pay such sum, and, from an order denying its motion for a new trial, plaintiff appeals.

1. On the trial a written assignment, absolute in form, to Thompson from plaintiff and Nolan, of all their right, title, and interest in the contract for the erection of the power-house, was given in evidence. This assignment was made

and dated soon after the work commenced, and long before it was finished.

It is contended by appellant that, after plaintiff and Nolan had assigned this contract, they could not make or file a statement of lien, and that they could not enforce any such statement made and filed by them, and that the making and filing of the same by them would not inure to the benefit of the assignee, Thompson; that an inchoate right of lien cannot be assigned, but that, if it can, the lien statement should be made by the assignee, and for his benefit, while this lien statement appears to be wholly for the benefit of the assignors.

It appeared by the evidence that the assignment was merely as collateral security to secure the repayment of money advanced by Thompson to plaintiff to enable him to carry on the work. This left sufficient interest in the plaintiff and Nolan to enable them to file the lien in their own names, and the benefit of it would inure to Thompson. On the same principle, plaintiff had sufficient interest in this controversy to commence this foreclosure suit in his own name. Thompson was a necessary party to it, and plaintiff's failure to make Thompson a party was cured by Thompson's own intervention.

It is also true that Thompson pleads an absolute assignment to himself of all sums earned, and to be earned, under this contract. Under this pleading, he could not, for the purpose of sustaining the lien statement filed by plaintiff and Nolan, prove that this assignment was merely for the purpose of security. But the failure to allege that the assignment was made merely for the purpose of security was cured by the evidence.

On the cross-examination of plaintiff as a witness on behalf of himself it was brought out by the questions of defendant counsel and the questions of the court, without objection, that this assignment was given merely as security. Thompson also testified to the same effect, and his testimony on this point was objected to ⁴⁰⁶ as incompetent, and tending to contradict a written instrument, but not on the ground that it was inadmissible under the pleadings.

2. Neither was it incompetent as contradicting a written instrument. It is well established that an instrument absolute on its face may be shown to be intended merely as security for the payment of a debt.

3. The contract provided that Davis and Nolan should entirely complete the power-house by August 1, 1892; that there should be deducted from the contract price twenty-five dollars per day for every day thereafter that they were in default in completing the contract; and the contract further provided "that they shall assume all risks from floods or casualties of every description, and shall make no charge for detention from any cause, but that they shall be entitled in case of detention from any such cause to an extension of time for the completion of said work equal to the amount of such damages." In section 34 of the specification it is also provided that in such case the contractor "will be entitled to an extension of time equal to the amount of such detention for the completion of the work.

The work was not substantially completed until December 24, 1892, and appellant claims that it should be allowed the stipulated damages for all of this time. To excuse this delay, the plaintiff and intervenor offered evidence to prove, and the court found, that defendant failed to furnish the contractors certain materials, which by the contract it agreed to furnish, at the time they were needed in the prosecution of the work, thereby delaying the completion of the building, and that alterations in the plans and specifications made by defendant, and other extra work ordered by defendant, further delayed the work, and that high water, floods, and other casualties further delayed the completion, and that by reason of all of these causes the completion was so delayed until December 24th as aforesaid.

We are of the opinion that there is sufficient evidence to sustain these findings, and that they are a sufficient defense to the claim for damages for the delay. Neither is it necessary to consider whether the evidence showing excuses for these delays was admissible under the pleadings. No such objection was made on the trial.

4. Neither was it error, as contended by appellant, for the court to refuse to permit it to prove its actual damages caused by this delay. ⁴⁰⁷ If it was entitled to offset any damages, they were the stipulated damages of twenty-five dollars per day, and not the actual damages.

5. There was also sufficient evidence to show that the contract was substantially performed, and that defendant waived a more complete performance. But we are of the opinion

that the findings of fact will not sustain a judgment declaring the sum found due to be a lien on the premises.

6. The court finds the assignment of the intervenor, Thompson, to be an absolute assignment of all the money earned, or to be earned, under the contract, and not an assignment merely for the purpose of security, though the uncontradicted evidence showed it was for the purpose of security. Whether such an inchoate right of lien is assignable it is not necessary to decide. Neither is it necessary to decide whether such an assignee could file a lien statement in his own behalf. In this case he has not done so. The assignors, making such an absolute assignment of the money earned on the contract, would have no further interest whatever in the contract after they had performed it on their part, but would then be strangers to the claim, and could not invoke the statutory remedy to secure it any more than they could maintain an action to recover it, and could not on their own behalf file a statement of lien. Whether they could file one on behalf of the assignee it is not necessary to decide. In such a case it would at least have to appear somewhere on the statement that it was so made on behalf of the assignee: *Griffin v. Chadbourne*, 32 Minn. 126. It does not so appear in this case. The court having found that the assignment of the claim was an absolute one, this necessarily renders void the lien statement found to have been made and filed by Davis and Nolan, and for this reason the order appealed from must be reversed in part.

The subdivisions of the findings of fact from Nos. 17 to 21, inclusive, are vacated, and so is the third subdivision of the conclusions of law, and a new trial is granted as to all the issues now in the case, or that may be made, except those covered by the other findings of fact.

So ordered.

BUCK, J., absent, sick, took no part.

MECHANIC'S LIEN—ASSIGNMENT OF.—A perfected mechanic's lien may be assigned, and the assignee may maintain an action in his own name for its enforcement: *Tuttle v. Howe*, 14 Minn. 145; 100 Am. Dec. 205, and note; note to *The Victorian*, 46 Am. St. Rep. 619. The assignee succeeds to all the rights of the mechanic: *Iaeger v. Bossieux*, 15 Gratt. 83; 76 Am. Dec. 189. The claimant of a mechanic's lien may assign both the debt and the lien: Note to *Tuttle v. Howe*, 100 Am. Dec. 211; but it has been held that the assignment of the debt destroys the lien: See monographic note to *Goble v. Gale*, 41 Am. Dec. 223, on waiver of mechanic's lien.

EVIDENCE.—**PAROL EVIDENCE** is admissible to show that an instrument absolute on its face was intended merely as security for the payment of a debt: *Knapp v. Bailey*, 79 Me. 195; 1 Am. St. Rep. 295; *Swart v. Service*, 21 Wend. 36; 34 Am. Dec. 211, and note. It is admissible to explain the object of an assignment absolute on its face: *Moses v. Murgatroyd*, 1 Johns. Ch. 119; 7 Am. Dec. 478, and note.

CONTRACTS—DELAY IN PERFORMANCE—STIPULATED DAMAGES.—An agreement to pay so much unless a contract is performed by a certain day is one for stipulated or liquidated damages: See monographic note to *Williams v. Vance*, 30 Am. Rep. 31, discussing the subject. The prevention of performance of a written contract by the defendant excuses performance on the part of the party prevented, and the latter may maintain his action immediately: *Rankin v. Darnell*, 11 B. Mon. 30; 52 Am. Dec. 557. One who prevents the performance of a condition, or makes it impossible by his own act, shall not take advantage of its nonperformance: *Cape Fear etc. Nav. Co. v. Wilcox*, 7 Jones, 481; 78 Am. Dec. 260; *Jones v. Walker*, 13 B. Mon. 163; 56 Am. Dec. 557.

KAJE v. CHICAGO, ST. PAUL, MINNEAPOLIS, AND OMAHA RAILWAY COMPANY.

[57 MINNESOTA, 422.]

PUBLIC NUISANCE—PLEADING—WHAT IS SPECIAL DAMAGE NOT COMMON TO GENERAL PUBLIC.—A complaint asking damages for a public nuisance states a cause of action and sufficiently shows that the plaintiff has sustained special damage not common to the general public where it appears that his lot fronted on a street as well as on a public alley running through the block from street to street that the defendant wrongfully obstructed the alley by erecting a building across one end of it; that it was too narrow to permit teams drawing vehicles to enter at the other end and turn around in it, and that, for this reason, access was largely cut off from the rear of plaintiff's lot on which he resided.

REAL PROPERTY—WHAT WILL NOT RENDER A LAWFUL BUSINESS UNLAWFUL.—The business usually carried on in a roundhouse and machine-shop, though smoke, dirt, and soot are emitted therefrom, is in itself lawful, and the fact that the building in which it is carried on is partly in a public alley does not render the business itself unlawful.

S. L. Perrin, for the appellant.

John W. Lane and Ambrose Tighe, for the respondent.

423 **CANTY, J.** This is an appeal from an order overruling a demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action.

The complaint alleges that the plaintiff is the owner of a city lot twenty-five feet wide, the rear end of which abuts on a public alley, twenty feet wide, running through the block from street to street, and that prior to June 1, 1891, said

alley was open for public use throughout its full extent, and was a means of access to plaintiff's lot; that, at said time, defendant erected across the end of said alley a building used as a roundhouse, and machine and repair shops, and has ever since maintained the same, and kept said alley closed; that, for the last three years, plaintiff has occupied his said lot, and resided in his dwelling-house thereon, and said acts of defendant have cut off his access to the rear of said lot; that said obstructions completely ⁴²⁴ cut off access to said alley from one of said streets, and that the alley is so narrow that it does not permit of the turning in it of a vehicle drawn by beasts of burden; that plaintiff was damaged by reason of said acts in a sum named, and demanded judgment.

It appeared by the complaint that the plaintiff's lot fronted on a street, and also that one end of the alley was open, and for this reason it is contended by appellant that it does not appear that plaintiff has sustained any special or peculiar damage not common to the general public.

We are not of that opinion. What constitutes special or peculiar damage, for which the private owner may maintain an action, is not always easy to determine. No general rule for determining it has been laid down which can readily be applied to every case. Where to draw the line between cases where the injury is more general or more equally distributed, and cases where it is not, where, by reason of local situation, the damage is comparatively much greater to the special few, is often a difficult task. In spite of all the refinements and distinctions which have been made, it is often a mere matter of degree, and the courts have to draw the line between the more immediate obstruction or peculiar interference, which is a ground for special damage, and the more remote obstruction or interference, which is not. It seems to us that in this case the obstruction is sufficiently immediate, and the interference sufficiently peculiar to plaintiff to constitute special damage to him.

It can readily be seen that obstructing at one point an alley only twenty feet wide may render it practically useless at all other points in the same block, as it is too narrow to drive in and turn around in it. To say that the abutting owner is not specially damaged by obstructing access to his lot in the rear when he has access to it by a street in the front, is much the same as saying that he is not damaged by obstructing the back door to his house when he has a front door. The rear

entrance to the lot is generally used for different purposes from the front entrance. Besides, a public alley is generally used more by the abutting owners, and less by the public, than an ordinary street. As held in *Aldrich v. Wetmore*, 52 Minn. 164, it is not necessary that access to the street be wholly and completely cut off to cause the abutting owner special damage. We cannot see that the allegation that the roundhouse and other structures ⁴³⁵ partly on this alley emit smoke, dirt, and soot alleges any element of damage. As far as appears by the complaint, the defendants are carrying on a lawful business, partly on other premises, and we cannot see that the fact that the structures in which the business is carried on are partly on this alley will render this business itself unlawful.

The order appealed from should be affirmed. So ordered.

COLLINS and BUCK, JJ., absent.

NUISANCE—OBSTRUCTION OF ALLEY.—In some jurisdictions alleys are held not to be primarily designed as streets, but simply as a means of local convenience to a limited neighborhood, and that an obstruction thereon is not a nuisance in itself: *Bagley v. People*, 43 Mich. 355; 38 Am. Rep. 192; *Beecher v. People*, 38 Mich. 289; 31 Am. Rep. 316. But the streets and alleys of a town are generally regarded as highways: See monographic note to *Mayhew v. Norton*, 28 Am. Dec. 303, on highways; *Niblett v. Nashville*, 12 Heisk. 684; 27 Am. Rep. 755. The owners of lands bounded on an alley, who have free use thereof, have the same rights therein that the public has in its highways, and closing the alley may properly be assumed to be a nuisance per se in an action to recover damages for its continuance: *Ellis v. American Academy of Music*, 120 Pa. St. 608; 6 Am. St. Rep. 739. Any unauthorized permanent structure materially encroaching upon a highway, or impeding or interfering with travel, is a nuisance per se: *Savage v. City of Salem*, 23 Or. 381; 37 Am. St. Rep. 692, and note.

DAMAGES FOR NUISANCE CREATED BY LAWFUL BUSINESS.—Lawful businesses must be so conducted as not to constitute nuisances, such as the creation of smoke, soot, cinders, etc.: Note to *Sullivan v. Royer*, 1 Am. St. Rep. 54. A trade or business, though lawful and useful, is a nuisance if it interferes with the reasonable enjoyment of neighboring property, or injures the property itself: *Susquehanna Fertilizer Co. v. Malone*, 73 Md. 268; 25 Am. St. Rep. 595; *Robb v. Carnegie*, 145 Pa. St. 324; 27 Am. St. Rep. 694. And one who sustains, by reason of a public nuisance, a special damage different from that which is common to all may maintain an action for such damage, though there are many other persons injured to the same extent as himself: *Wylke v. Ellwood*, 134 Ill. 281; 23 Am. St. Rep. 673; *Jackson v. Kiel*, 13 Col. 378; 16 Am. St. Rep. 207. The action lies without regard to the locality where the business is carried on; *Susquehanna Fertilizer Co. v. Malone*, 73 Md. 268; 25 Am. St. Rep. 595; but in determining the question of nuisance from smoke, cinders, or noxious vapor, reference must be had to the character

and manner of using the property producing the injury complained of. In such cases trifling annoyances and inconveniences suffered by persons dwelling in cities will not be regarded as nuisances: *Buler v. Sullivan*, 75 Md. 616; 32 Am. St. Rep. 420.

SCHULTZ v. BOWER.

[57 MINNESOTA, 493.]

TRIAL.—A VIEW OF THE PREMISES is allowed, not for the purpose of furnishing evidence upon which a verdict is to be found, but solely for the purpose of better enabling the jury to understand and apply the evidence given in court.

APPEAL—VIEW OF PREMISES—INSTRUCTIONS.—It is reversible error to instruct the jury that they may use as evidence in the case what they saw or learned upon a view of the premises.

REAL PROPERTY.—THE RIGHT OF LATERAL SUPPORT is an absolute right of property, and the owner has a legal remedy against one who removes the natural support of the soil, which is based, not upon negligence, but upon the violation of the right of property.

REAL PROPERTY.—THE RIGHT OF LATERAL SUPPORT applies only to the land itself, and not to the buildings or other artificial structures thereon.

REAL PROPERTY—LATERAL SUPPORT—ACTIONABLE WRONG.—If one, by digging in his own land, causes the adjoining land of another to fall, the actionable wrong is not the excavation, but the act of allowing the other's land to fall.

DAMAGES—REMOVAL OF LATERAL SUPPORT.—The measure of damages for causing the soil of another to fall by removing its lateral support is the diminution of the value of the land by reason of such fall, where the fall is the natural and proximate result of such removal.

ACTION to recover damages for removal of lateral support. There was a verdict for the plaintiff, Katharine Schultz, and the defendant appealed from an order denying his motion for a new trial.

Little & Nunn, for the appellant.

M. C. Brady, for the respondent.

495 **MITCHELL, J.** This was an action for damages for the wrongful act of the defendant in removing the lateral support of plaintiff's soil from the adjacent land, causing it to fall. The jury was sent out to view the premises. This is allowed, not for the purpose of furnishing evidence upon which a verdict is to be found, but solely for the purpose of better enabling the jury to understand and apply the evidence given in court: *Chute v. State*, 19 Minn. 271; *Brakken v. Minneapolis etc. Ry. Co.*, 29 Minn. 43.

When the court sent the jury out, he instructed them to carefully view the premises, so as to form an opinion for themselves, in connection with the evidence, of what the damages were; and in the charge the jury were told that they had been permitted to look the premises over, so that they might have another standard by which to gauge the evidence they had heard in court; that it might perhaps help them in determining whether the witnesses for the plaintiff or the witnesses for the defendant had more nearly told the truth in regard to the damages to the premises. And again, when asked by a juror whether "they had to go according to the evidence or not," the court told them they had to go by the evidence, but added that testimony was one thing and evidence was another; that "testimony" was the words they heard in court, and "evidence" what they considered it worth; that they were not bound to accept as true the statements of witnesses as to the damages, but had a right to weigh them with their common sense, judgment, and experience, aided by what they saw on the premises; that they were not sent out to go blindfolded, and see nothing, but to see what they could, as business men, in the light of their experience; and that they must determine the issue in the case by the evidence given in court, "and in the light of what they saw there."

While the court did, in the course of the charge, instruct the jury in general terms that they should be guided by the evidence given in court—that that was the evidence by which they were bound if they believed it to be true—yet the instructions which we have referred to were not withdrawn, or in any way expressly modified.

496 Our opinion is that, taking the charge as a whole, its fair import is that the jury might use what they saw or supposed they had learned on the view as evidence in the case, at least for some purposes. This, we think, is the way it would be naturally understood by the jury. This was error, for which a new trial must be granted.

There are one or two suggestions as to the law of such cases which it may be well to make in view of a second trial. The right of lateral support from the adjacent soil is an absolute right of property; and, as a consequence of this principle, it follows that for any injury to his soil, resulting from the removal of the natural support to which it is entitled, by means of excavation on an adjoining tract, the owner has a

legal remedy against the party by whom the mischief has been done. This does not depend upon negligence, but upon the violation of the right of property: *Nichols v. City of Duluth*, 40 Minn. 389; 12 Am. St. Rep. 743; *Foley v. Wyeth*, 2 Allen, 131; 79 Am. Dec. 771; *Gilmore v. Driscoll*, 122 Mass. 199; 23 Am. Rep. 312; *McGuire v. Grant*, 25 N. J. L. 362; 67 Am. Dec. 49. This unqualified or absolute right of lateral support applies only to the land itself, and not to the buildings or other artificial structures. Where one, by digging in his own land, causes the adjoining land of another to fall, the actionable wrong is not the excavation, but the act of allowing the other's land to fall: *Sedgwick on Damages*, sec. 925.

Hence, the measure of damages is the diminution of the value of the land by reason of the falling of the soil; and it is immaterial whether this falling be called "caving" or "washing," provided it is the natural and proximate result of removing the lateral support.

Order reversed.

COLLINS and BUCK, JJ., absent, took no part.

TRIAL—VIEW OF PREMISES.—The object of allowing a view of the premises is not to furnish evidence upon which a verdict may be found, but to enable the jury better to understand and apply the evidence given in court. They must not base their verdict in any degree upon the inspection itself. Even the impression made upon their minds by it is not evidence in the case, and cannot be considered in making up their verdict: See monographic note to *Erwin v. Bulla*, 92 Am. Dec. 343, 345, discussing the subject. The jury have no right to base their finding on evidence not adduced in court, nor upon a view not authorized by the court: *Peppercorn v. City of Black River Falls*, 89 Wis. 38; 46 Am. St. Rep. 818.

REAL PROPERTY—LATERAL SUPPORT.—For any injury to his soil resulting from the removal of the natural support to which it is entitled, by means of excavation on the adjoining tract, the owner has a legal remedy in an action at law against the party by whom the work has been done for the mischief thereby occasioned. This does not depend upon negligence or unskillfulness, but upon the violation of a right of property which has been invaded and disturbed. This rule, however, is limited to injuries caused to the land itself, and does not afford relief for damages by the same means to artificial structures. The measure of damages is the diminution in the value of the lot by reason of the defendant's acts, and not what it will cost to restore the lot to its former condition: See monographic note to *Larson v. Metropolitan Street Ry. Co.*, 33 Am. St. Rep. 472, 475, on the right to lateral support.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

GATE CITY BUILDING AND LOAN ASSOCIATION v.
NATIONAL BANK OF COMMERCE.

[126 MISSOURI, 82.]

BANKS AND BANKING—POWER OF AGENT TO INDORSE CHECK—MISAPPLICATION OF MONEY.—The secretary and active manager of a building association who is also its general financial agent and custodian of its securities, with power to collect them and “to receive all moneys and pay the same over to the treasurer,” has implied power to indorse a check payable to the order of the association, and if, after such indorsement, he deposits the check to the credit of his personal account, the bank receiving the deposit in good faith and due course of business is not liable for his misappropriation of the money paid out on his individual checks.

C. S. Owsley, and Lathrop, Morrow, Fox & Moore, for the appellant.

E. Robinson, for the respondent.

84 **BRACE, J.** This is an appeal from a judgment in favor of the defendant in the Jackson county circuit court.

The plaintiff is a building and loan association organized under the laws of this state, of which, at the time of the transaction in question, E. E. Richardson was president, Benjamin Holmes, treasurer, and George L. Harris, secretary. In June, 1887, the association made a loan to Richardson of four thousand dollars evidenced by his bond, and secured by a deed of trust on some property in Kansas City. In June, 1888, Richardson concluded to pay off this loan, and made an arrangement with Judge Brumback for that purpose, who, on the 19th of June, 1888, drew his own check of that date for three thousand six hundred and seventy-six dollars and seventy-four

cents, the balance due thereon, "on Armour Bros. Banking Company," payable to "Gate City Building and Loan Association," and delivered the same to the said Harris in payment thereof, who indorsed said check "Gate City B. & L. Assn., by George L. Harris, secretary"; and on the next day presented the same to the defendant bank, in which ^{ss} was then being kept an account in the name of said association, as also an individual account in the name of said Harris for deposit on his personal account. Thereupon the check was credited to Harris on his individual account, and collected by the bank, through the clearing house of Armour Bros. Banking Company, on the 21st of June, 1888. Afterward, the proceeds thus placed to the credit of Harris on his personal account were checked out by him on his individual checks, for what purposes does not appear, except that on the same day of the deposit there was deposited to the credit of the association on its account the sum of five hundred and ninety dollars and thirty-three cents, the exact amount of one of his checks on that day charged to him on his individual account.

On the same day the check was given by Brumback the following written statement was made upon the face of the bond of Richardson: "Received, June 19, 1888, payment in full by E. E. Richardson, per J. Brumback, \$3,676.74. Geo. L. Harris, secretary." And the deed of trust was satisfied of record by a deed of quitclaim executed by the vice-president of the association in pursuance of a special order of the board of directors.

Harris, the secretary, was the active manager of the association, and, under its by-laws, the custodian of its bonds, notes, mortgages, and other securities, the keeper of its accounts with its officers and members and those having dealings with the association, whose duty it was "to receive all moneys and pay the same over to the treasurer," and "at all meetings of the board of directors furnish a statement of the financial condition of the association, and give a detailed statement thereof at each annual meeting, and make a semi-annual report for publication in January and July of each year." The treasurer was the custodian of the money of the association, whose duty it was "to ^{ss} receive from the secretary all money paid into the association," to "pay all orders issued by the board of directors, signed by the president and countersigned by the secretary," and to keep his accounts "open at all times to the inspection of the president and

board of directors," and, when demanded by them, "to give satisfactory proof that the money and other assets are actually in hand in accordance with his own books and those of the secretary." It was the duty of the board of directors to hold monthly meetings for the transaction of the business of the association, not otherwise provided for, on the first Monday evening of each month.

In the account of Holmes, the treasurer, kept by the secretary in the ledger of the association, appears the following entry: "October 1, 1888. Cash, E. E. Richardson, loan returned, thirty-seven hundred dollars."

The evidence further tends to prove that Harris made the deposits to the credit of the association's account in the bank; that he was the only one that came to the bank to attend to its business; that prior to this transaction Harris had been making deposits both on his own account and on the account of the association; that he was in the habit of depositing checks payable to the association indorsed as this one was, and no checks came to the bank indorsed in any other way; that he made other deposits to his own credit in the same way; that he "used very often to deposit the entire receipts to his own credit and then give the company a check to cover it, and deposit it to the credit of the association"; that no objection was ever made by any of the officers of the association to his mode of doing the business at the bank, and this check was not deposited otherwise than in the regular course of his business with the bank.

⁸⁷ It further appears from the evidence that, in April or May, 1889, Harris absconded, and it was thereafter discovered by the association that there was a shortage in his accounts, and that the check in question had been deposited by him to the credit of his individual account. In July thereafter, a demand was made on the bank for the return of the money collected thereon, and on the 28th of September, 1889, this suit was instituted for its recovery, in the form of an action for money had and received to the use of the association.

At the close of all the evidence the court instructed the jury to find for the defendant; plaintiff thereupon took a nonsuit, and, the court refusing to set the same aside, the plaintiff appeals.

The law of the case seems to be within a narrow compass. There is not a particle of evidence tending to prove that the bank did not act in perfect good faith in this transaction, in

respect of which it occupied no fiduciary relation to plaintiff. It does not appear from the evidence to what purpose the proceeds of the check were ultimately applied by Harris—it may have been to his own or to those of the association—nor is this a matter of any importance upon the present issue. The bank was not responsible for the proper application of those proceeds by him: Rev. Stats. 1889, sec. 8691. The check was a negotiable instrument: *Famous etc. Co. v. Crosswhite*, 124 Mo. 34; 46 Am. St. Rep. 424. The credit given to the account of Harris was the same as if the money had been paid him on the check and had been immediately placed back by him and credited on his own account: *Benton v. German-American Nat. Bank*, 122 Mo. 332; *Oddie v. City Nat. Bank*, 45 N. Y. 735; 6 Am. Rep. 160; 2 Morse on Banks and Banking, 3d ed., sec. 451. The bank thereby became a purchaser for value, in the ordinary course of business of the instrument, and entitled to collect the proceeds thereof to its own account if it acquired plaintiff's title by indorsement. So that the ^{ss} only question is, Did Harris in his official capacity as secretary have power to transfer the check by indorsement?

By the by-laws the secretary was made the general fiscal agent of the association—the custodian of all its securities, whether bonds, bills, notes, drafts, checks, or whatever their form might be. To him and to him alone was intrusted the duty of keeping the accounts of the association and of collecting all moneys due or coming to the association on account of such securities or from any other source. All moneys were to pass through his hands into those of the treasurer, whose only authority was to receive the moneys of the association from the secretary and pay the same out in the manner prescribed by the by-laws. The by-laws were of course made for an association to be conducted in accordance with the business principles of the age, and it would be a strange construction of those by-laws, in an age in which nine-tenths of the business of the country is transacted through the medium of bills of exchange, inland drafts, and bank checks, to hold that this secretary, who it is conceded had full power to collect the loan from Richardson, and in doing so to receive the check of Brumback therefor payable to the association, and who had full power to collect said check, had not the power to indorse the check for the association in order that he might have in hand the

actual money which he was required to receive and to pay over to the treasurer. Although the by-laws do not in express terms give the power to indorse checks or to give acquittances for money received on account of the association, yet these powers are necessarily implied in the power given to the secretary to collect its securities, and pay the money for the same to the treasurer.

While by the by-laws all moneys are to pass through the hands of the secretary into those of the treasurer, ⁸⁹ and he must have all the power necessary to enable him to collect the money for such securities and have it on hand for that purpose, they do not contemplate that it shall remain in his hands for any considerable length of time, or that it shall be paid out by him at all, and in order that no loss or inconvenience may result therefrom, the accounts showing the condition of its treasury were open at all times to the inspection of the board of directors, whose duty it was each month to meet, ascertain the amount in the treasury, and loan the same if practicable. Had these officers discharged their duties the exact condition of the fund arising from the collection of the loan to Richardson would have been known to them within ten or fifteen days after it had been received by Harris, and they could have then taken such measures for its disposal and the protection of the association, as to them might have seemed necessary and proper. If the association has met with any loss by reason of a misapplication of that fund it must be charged to a breach of the trust reposed in one of its officers and the neglect of duty by the others. It cannot be charged to the bank on account of this transaction had with its secretary, who therein acted clearly within the scope of his authority.

The judgment is affirmed.

All concur.

AGENCY—INDORSEMENT OF CHECKS BY.—The authority to indorse commercial paper as the agent of the owner will not be implied from some other express authority unless shown to be strictly necessary to the complete execution of the express power: *Jackson v. Bank*, 92 Tenn. 154; 36 Am. St. Rep. 81, and note. See, also, the extended note to *Huntley v. Machias*, 47 Am. Rep. 520.

LOVELACE v. TRAVELERS' PROTECTIVE ASSN.

[126 MISSOURI, 104.]

CONTRACTS—CONSTRUCTION.—Contracts must be interpreted so as to give effect to the reasonable and natural intention of the parties as expressed by the language they have used.

INSURANCE—DEATH BY "ACCIDENT" means death from any unexpected event which proceeds from an unknown and unforeseen cause, happening without the design of the person acted upon.

INSURANCE—ACCIDENT.—DEATH FROM DIRECT VIOLENCE of a third party may be an accident within the meaning of a policy insuring the life of the deceased.

INSURANCE—ACCIDENT.—GROSS NEGLIGENCE of the insured does not defeat recovery upon an accident insurance policy.

INSURANCE—ACCIDENT, WHAT IS.—A hotel guest, who during the illness and absence of the proprietor voluntarily attempts to remove a third person from the hotel office by force for boisterous conduct, and is killed by him in the attempt, suffers death by accident within the meaning of a policy merely insuring against "death by accident."

H. T. Kent, for the appellant.

V. Reyburn, for the respondent.

108 **BARCLAY, J.** This is an action upon a benefit certificate, in the nature of an insurance policy, issued to Charles H. Lovelace by the Travelers' Protective Association of America, the defendant, a benevolent association, incorporated under the laws of Missouri. The pleadings need not be recited. No point is raised touching the formal presentation of the case.

Counsel for both parties, with commendable frankness and brevity, have put the material facts into compact form to facilitate the solution of the controversy. It was submitted to the trial judge, without a jury, upon an agreed statement and depositions. The only question now urged is a question of law. Mr. Lovelace was a member in good standing in the defendant association when he met with his death, August 8, 1892. The plaintiff is his mother, the beneficiary in his membership certificate. The contract of insurance is contained in the certificate and in parts of the constitution of the association, which, counsel mutually agree, control the issue of the litigation. In the statement, introducing the report of the case, copies of these documents are given. No point is raised touching proofs of loss, notice, or any formal matter. The defendant meets the case broadly on its merits.

The decisive question before us is, Was the death of the assured an "accident" within the true meaning of the con-

tract of insurance? The question was presented by an instruction that, under the evidence, plaintiff was not entitled to recover; which the trial court refused to give. On the contrary, the court ¹⁰⁹ found for the plaintiff, and gave judgment accordingly for four thousand one hundred and nineteen dollars and thirty cents (which included some interest). Defendant then appealed, after the usual preliminaries.

The following facts show the circumstances of the death of Mr. Lovelace: He was a commercial traveler. On the fifth day of August, 1892, he came as a guest to the hotel in Hazelhurst, Mississippi. He was a friend of the proprietor, and spoke to some member of the latter's family on the porch of the hotel before entering the office. Another man named Graves was in the office of the hotel, making more or less noise, and cursing at times, when Lovelace arrived, about half past eleven o'clock at night.

The only witness besides Graves who saw the killing was one Scott. From his testimony it seems that that night the proprietor, Mr. Brown, was sick, and there was no one in charge of the office. Scott was putting in the chairs from the porch when Lovelace walked in and said: "Who has got charge of the office to-night?" Scott answered, no one, and that he was going to bed. Lovelace then said: "It looks like somebody ought to be about it." And Lovelace then turned to Graves and said: "Look here, young man, you have got to get out of here, drinking and cursing that way"; and Graves replied, "What have you got to do with it?" Lovelace answered, "I am a guest at the hotel, and I think a heap of the family; and I think, in the absence of Mr. Brown, it is sorter my duty to see after things." Graves said, "You had better put me out"; Lovelace replied, "I will do it in a pair of minutes." And Graves said, with an oath, "he would like to see him [Lovelace] put him out." Lovelace said, "I will do that — quick." Scott then walked between them and separated them.

¹¹⁰ Lovelace started upstairs, but it seems that he turned again and went back to the register. Lovelace then said, with an oath, "Don't you shake your hand in my face." (Graves had made a gesture which Lovelace interpreted as he stated.) They were then a few feet apart. Graves replied, "You put me out! You have not got any more to do with this than I have." Lovelace then declared he would slap Graves, and

applied an opprobrious epithet to him. Lovelace then slapped and pushed Graves back until the latter struck the wall, or door which was closed; and whilst they were thus together, Graves drew a pistol from his pocket, and shot Lovelace several times, in consequence of which he afterward died. Lovelace weighed one hundred and seventy-five pounds. He would have pushed Graves, who was much lighter and smaller, out of the door, if it had been open. Lovelace did not know Graves at the time. The next day he asked what boy that was that shot him.

The foregoing gives a sufficient description of the scene, as defendant claims it occurred. The substance of the contention on that side is, that Mr. Lovelace lost his life at the hands of Graves in a fight with the latter, brought on by the language and acts of the former. It was not claimed, however, that Lovelace knew that Graves was armed when the difficulty began.

The defendant asserts that "it is not an accidental killing, such as to make the defendant liable, where the death was the result of a rencounter, or where the party killed was the voluntary agent in bringing on the difficulty resulting in his death, or placed himself in such a position as to induce it." On the other hand the plaintiff insists that the occurrence was an "accident."

¹¹¹ The contract in this case is to be interpreted so as to give effect to the intention of the parties, as expressed by the language they have used. That intention is, moreover, to be construed as the reasonable and natural one imported by their words: Rutherford's Institutes, 2d Am. ed., 413. "In case of death by accident," is the language immediately in view. In the same contract we note that the defendant was to pay one hundred dollars "in case of his death from natural causes."

The form of the contract is very simple. It is free from those limiting terms, which, in two of the three cases cited by the defendant, formed the basis of the judgments therein. We are merely called on to say whether his death was by "accident" within the intention of these parties. They did not define the term, further than its use, in contradistinction to "death from natural causes," may be considered as having some significance. We, hence, should give the word its usual, natural, and popular meaning, there being nothing to

indicate a different purpose in its use. In that sense, was Lovelace's death an accident?

We find the following definitions of "accident" in the law dictionaries: "Death by accident means death from any unexpected event which happens as by chance, or which does not take place according to the usual course of things": Anderson's Law Dictionary (1889). "An unusual or unexpected event": Abbott's Law Dictionary (1879). "An unforeseen event, occurring without the will or design of the person whose mere act causes it; an unexpected, unusual, or undesigned occurrence": Black's Law Dictionary (1891). ¹¹² "An event which, under the circumstances, is unusual and unexpected by the person to whom it happens": Bouvier's Law Dictionary (1883). "A casualty; an act of Providence; an event that takes place without one's foresight or expectation": Burrill's Law Dictionary (1887). "An extraordinary incident; something not expected": Wharton's Law Lexicon (1883).

The larger dictionaries of the English language furnish these among other definitions of "accident," viz: "In general, anything that happens or begins to be without design, or as an unforeseen effect; . . . Specifically, an undesirable or unfortunate happening; . . . a casualty or mishap": Century Dictionary (1889).^{*} "Literally, a befalling; an event that takes place without one's foresight or expectation; an undesigned, sudden, and unexpected event; . . . often an undesigned and unforeseen occurrence of an afflictive or unfortunate character; a casualty; a mishap; as, to die by an accident": Webster's International Dictionary (1892). "An event proceeding from an unknown cause, or happening without the design of the agent; an unforeseen event; incident; casualty; chance": Worcester's Dictionary (1888).

On several occasions the courts have approved or quoted some of the foregoing definitions, in dealing with the subject of accident insurance: *Schneider v. Provident Life Ins. Co.* (1869), 24 Wis. 30; 1 Am. Rep. 157; *Providence etc. Co. v. Martin* (1869), 32 Md. 315; *Ripley v. Railway etc. Assur. Co.* (1870), Fed. Cas. No. 11,854; 2 Bigelow's Life Insurance Reports, 741; *North American etc. Co. v. Burroughs* (1871), 69 Pa. St. 51; 8 Am. Rep. 212; *Supreme Council v. Garrigue* (1885), 104 Ind. 140; 54 Am. Rep. 298. In other cases they have freely used the word in decisions in the broad meaning which those definitions express: *Vincent v. Stinehour* (1835),

7 Vt. 62; 29 Am. Dec. 145; *Bostwick* ¹¹³ v. *Stiles* (1868), 35 Conn. 195; *Clements v. Railway Co.* (1894), 2 Q. B. Div. 482.

Some special cases on accident policies different from that now before us furnish, nevertheless, opinions of learned judges which cast some useful light on the present controversy.

In *Sinclair v. Assurance Co.* (1861), 4 L. T. Rep., N. S., 15, a case wherein the court of queen's bench denied a right of recovery for death caused by a sunstroke sustained by the master of a ship in China, holding that such death was not "a personal injury arising from an accident at sea," it was said by Chief Justice Cockburn: "It is difficult to define the term 'accident,' as used in a policy of this nature, so as to arrive with perfect accuracy at the boundary line between death from accident and death from natural causes. At the same time, we think we may safely assume that in the term 'accident,' as so used, some violence, casualty, or *vis major* is necessarily involved."

In *Fenwick v. Schmalz* (1868), L. R. 3 Com. P. 313, Willes, J., held that a snowstorm was not an accident (as mentioned in a charter party), because it is one of the ordinary operations of nature. He said it "is an incident rather than accident." He then remarked: "An accident is not the same as an occurrence, but is something that happens out of the ordinary course of things."

In *Ripley v. Railway etc. Assur. Co.* (1870), Fed. Cas. No. 11,854, 2 Bigelow's Insurance Reports, 741, already cited, it is said: "In the more popular and common acceptation of the word 'accident,' if not in its precise meaning, includes any event which takes place without the foresight or expectation of the person acted upon or affected by the event." Death by drowning (*Winspear v. Accident Ins. Co.* (1888), 6 Q. B. Div. 42) and by fright (*McGlinchey v. Fidelity etc. Co.* (1888), 80 Me. 251; 6 Am. St. Rep. 190) have been held to be ¹¹⁴ deaths by accident under policies of much narrower scope than that now before the court.

We have quoted these various cases, definitions, and comments, not with a view to approve or criticise any one of them, but to indicate the very wide range of meaning borne by the word "accident," when unaccompanied with any limitation in the context. We shall not attempt to furnish any general definition of an accident in the particular case before

us, further than the conclusion we shall announce may imply.

The learned counsel for defendant concedes the force of the argument deduced from the ordinary meanings of the word, but insists that they cannot apply where the insured has voluntarily assumed the risk which proves to be fatal, in this instance, by entering into the altercation which led to his death.

But there is one weak point in that contention. There is no proof whatever that the insured had any cause or reasonable ground to anticipate that he would be shot or killed when he undertook to attempt to eject Graves from the hotel. There is no proof that Graves exhibited a weapon, or made any remarks indicating a purpose to shoot, before the affray. The mere fact that Lovelace engaged in or brought on a fight in the manner described did not of itself indicate that he sought death, or had reason to expect it as a consequence of his action.

In *Schneider v. Provident Life Ins. Co.* (1869), 24 Wis. 28, 1 Am. Rep. 157, a party was allowed to recover upon an accident policy, though it appeared he had been negligent in attempting to board a moving train of cars. The court said: "There is nothing in the definition of the word 'accident' that excludes the negligence of the injured party as one of the elements contributing to produce the result. . . . An accident may happen from ¹¹⁵ an unknown cause, but it is not essential that the cause should be unknown. It may be an unusual result of a known cause, and therefore unexpected by the party. And such was the case here, conceding that the negligence of the deceased was the cause of the accident." That decision was approvingly followed in the case from the seventy-second Maryland report already cited.

In *Keene v. New England Mut. Accident Assn.* (1894), 161 Mass. 149, a recovery on an accident policy was sustained where the assured was run down while passing over a street crossing of a railway track in front of a moving freight-car, notwithstanding the policy required the assured "to use all due diligence for personal safety."

In *Cornish v. Insurance Co.* (1889), 23 Q. B. Div. 453, it appeared that the insured met his death by attempting, in broad daylight, to cross the main line of a railway in front of a coming train, which struck and killed him. The English court of appeal held that there could be no recovery upon

a policy which excepted from the risks insured against accidents happening by "exposure of the insured to obvious risk of injury." But Lindley, L. J. (who delivered the leading opinion), placed the ruling upon the language just quoted, remarking, in so doing: "We accept the view of the jury that this accident may be called an ordinary misadventure, but the question is, whether the policy covers it." He thus characterized the mishap as an "accident," notwithstanding the gross negligence of the insured.

In *Travelers' Ins. Co. v. McConkey* (1888), 127 U. S. 661, where the insured had been killed by a shot (whether fired by himself or by another was in issue), the supreme court of the United States based a similar ruling, denying a recovery, on the express terms of the ¹¹⁶ policy, excepting from its scope "intentional injuries, inflicted by the insured or any other person."

A like ruling was made in construing the same language of an accident policy in this state: *Phelan v. Travelers' Ins. Co.* (1890), 38 Mo. App. 640. In other cases it has been held that death produced by the direct violence of a third party is none the less an accident (as regards the insured), because the injury was intentionally inflicted by the third party: *Hutchcraft v. Travelers' Ins. Co.* (1888), 87 Ky. 300; 12 Am. St. Rep. 484; *Richards v. Travelers' Ins. Co.* (1891), 89 Cal. 170; 23 Am. St. Rep. 455. But in the former case a recovery was denied because of a clause in the policy similar to that quoted above from *Travelers' Ins. Co. v. McConkey*, 127 U. S. 661.

It has been declared, with reference to fire insurance, that even gross negligence of the insured will not defeat a recovery in the absence of stipulations having such an effect: *Shaw v. Robberds* (1837), 6 Ad. & E. 75; *St. Louis Ins. Co. v. Glasgow* (1844), 8 Mo. 713; 41 Am. Dec. 661; *Johnson v. Berkshire Ins. Co.* (1862), 4 Allen, 388; *Enterprise Ins. Co. v. Parisot* (1878), 35 Ohio St. 35; 35 Am. Rep. 589.

In *Supreme Council v. Garrigus* (1885), 104 Ind. 133, 54 Am. Rep. 298, it was ruled that, where the insured engaged in a fight, without fault on his part, in consequence of which he received injuries resulting in his death, the latter was an "accident" within the meaning of a benefit certificate.

In view of the definitions and legal precedents above quoted and cited, and of the very general terms of the policy under consideration, we conclude that its reasonable and natural

meaning includes, within the term "accident," such a death as Lovelace met.

Whether he acted lawfully as a guest of the hotel, during the absence and illness of the proprietor, in attempting to remove Graves from the hotel office by force, we think needless to investigate. It may be assumed that, by his course of conduct, he voluntarily ¹¹⁷ assumed the risks of a fight. But there is nothing in the circumstances to show that he voluntarily assumed the risk of death.

We consider his killing an "accident," in the popular and ordinary sense in which that word is generally used. It certainly was an accident, so far as he was concerned. We do not doubt that such should be the construction given to the word in the contract in suit; and that, in so concluding, we give effect to the true purpose and intent of the parties to the document.

The learned trial judge reached the same conclusion.

The judgment is affirmed.

BLACK, C. J., and BRACE and MACFARLANE, JJ., concur.

CONTRACTS—CONSTRUCTION—INTENT.—A written contract should be construed according to the obvious intention of the parties: *Monmouth Park Assn. v. Wallis Iron Works*, 55 N. J. L. 132; 39 Am. St. Rep. 626, and note. See, also, the notes to *Cravens v. Eagle Cotton Mills Co.*, 16 Am. St. Rep. 306, and *Chism v. Schipper*, 14 Am. St. Rep. 675.

INSURANCE—DEATH BY "ACCIDENT."—The word "accident" is construed to include a casualty, or something out of the usual course of events, which happens without any design on the part of the person injured: *Richards v. Travelers' Ins. Co.*, 89 Cal. 170; 23 Am. St. Rep. 455, and note; *Paul v. Travelers' Ins. Co.*, 112 N. Y. 472; 8 Am. St. Rep. 758, and extended note.

INSURANCE—ACCIDENT—DEATH BY VIOLENCE OF THIRD PERSON.—Where a policy of insurance contains a provision that it only covers injuries effected through "accidental means," an injury not anticipated, and not naturally to be expected by the insured, though intentionally inflicted by another, is an accidental injury within the meaning of the policy: *Insurance Co. v. Bennett*, 90 Tenn. 256; 25 Am. St. Rep. 685, and note; *Richards v. Travelers' Ins. Co.*, 89 Cal. 170; 23 Am. St. Rep. 455. Death by being waylaid and assassinated authorizes a recovery under a policy insuring the person so killed against death "through external, violent, or accidental means": *Hutchcraft v. Travelers' Ins. Co.*, 87 Ky. 300; 12 Am. St. Rep. 484, and note. See, also, the extended note to *Paul v. Travelers' Ins. Co.*, 8 Am. St. Rep. 766.

INSURANCE—ACCIDENT.—EFFECT OF VOLUNTARY EXPOSURE TO UNNECESSARY DANGER is discussed in the extended note to *Travelers' Ins. Co. v. Jones*, 12 Am. St. Rep. 272.

BARKER v. ST. LOUIS IRON MOUNTAIN AND SOUTHERN RAILROAD COMPANY.

[126 MISSOURI, 143.]

EVIDENCE—DECLARATIONS OR ADMISSIONS AS PART OF RES GESTÆ.—Declarations by a train conductor as to his motives of hostility in ejecting a passenger, made to another passenger eight or ten minutes after the ejection, are not admissible against the railway company, either as an admission or as part of the *res gestæ*.

EVIDENCE—DECLARATIONS.—A railway company is not bound by declarations made by its train conductor as to his motives which do not accompany or form part of some act or transaction within the apparent line of service for which he is employed.

EVIDENCE—DECLARATIONS AS PART OF RES GESTÆ.—The expression of mere thoughts or feelings engendered by a certain occurrence or fact does not form a sufficiently substantial connecting link between the fact and the subsequent statement of an eyewitness about it to make that statement admissible in evidence as part of the *res gestæ*.

APPEAL—IF INCOMPETENT EVIDENCE HAS BEEN ADMITTED AGAINST OBJECTION, the objecting party may cross-examine upon or otherwise combat it without waiving his right to have the objection reviewed on appeal.

H. S. Priest and M. L. Clardy, for the appellant.

W. Moore and J. A. Boone, for the respondent.

146 **BARCLAY, J.** This is an action to recover damages for personal injuries sustained by plaintiff by reason of his alleged unlawful ejection from defendant's train. The defense is that plaintiff was justifiably ejected, and that no unnecessary force was used in putting him off. The defensive allegations were put in issue by plaintiff's reply. The cause then came to trial in due course. The jury found for plaintiff in the sum of seven thousand five hundred dollars under instructions which need not be closely examined, since the cause should go back for another reason, and the objectionable features of the old instructions can be removed in event of another trial.

It may be well, however, to mention (before leaving the subject of the instructions) that they were framed so as to authorize the jury to award not merely compensatory damages for plaintiff's injuries, but also exemplary damages, in the discretion of the jury, if they found that the conductor and other agents of defendant acted wantonly and maliciously in ejecting him from the cars. There was evidence given by plaintiff and defendant, respectively, tending to support their several theories of the case already outlined.

Plaintiff's testimony was to the effect that he was ejected

from the rear platform of the last car of one of defendant's passenger trains, by the conductor and brakeman, one dark night, about 10 or 11 o'clock, in September, 1890, without cause, while the train was in motion and in a dangerous place.

On the other hand, defendant's evidence accounted for the ejection by plaintiff's refusal to pay fare, ¹⁴⁷ insulting conduct on his part toward fellow-passengers, particularly women; negatived all unnecessary force and any unlawful act by defendant's agents, and especially denied that he was ejected while the train was in motion.

During plaintiff's case, one of his witnesses was allowed to testify that he (the witness) was in the smoking-car when a stop occurred. After that stop the witness started back to the rear of the train. He met a man on the way, who told him of the fact that plaintiff had been ejected. Witness then entered the last car, from the rear end of which plaintiff had been put off, and his testimony then goes on thus: "I went right in; I rushed in the car and asked Mr. Howe if he put that man off, and he said he did. I asked him to stop and get him; I told him I was afraid he was hurt, and he just remarked that he ought to have broke his darned neck, or damned neck, I could n't say for certain which it was." This testimony was objected to as incompetent, irrelevant, and calculated to mislead the jury; but the objection was overruled and defendant duly excepted. The court remarked, in making the ruling, "The declarations of Captain Howe are competent."

The witness above quoted testified, on his direct examination, that this conversation with the conductor, Mr. Howe, took place about eight or ten feet from the front door of the rear passenger-car; and that the train "had stopped some time before that." On his cross-examination he further said, on this point, in answer to a question as to the interval of time between the stopping of the train and his start from the smoking-car, that, to the best of his knowledge, it was eight or ten minutes.

This statement is thought by some of my learned colleagues to have been intended by the witness to ¹⁴⁸ refer to some other "stop" than that at which plaintiff was put off. At all events, it is clear that the conversation with the conductor was not later than these eight or ten minutes after the ejection. It may have been earlier, but it was plainly

after the fact—after the conductor had finished the act, and had gone to the other end of the car where he met Mr. Johnson, the witness. The whole evidence does not bring that conversation into any other relation to the act of plaintiff's ejection than is indicated by the facts given above.

The question then is, Was the conversation admissible? The main ground on which plaintiff seeks to justify its admission is that it formed a part of the *res gestæ*. On that ground my learned brother, Macfarlane, has sustained its admissibility, though, it seems to me, he apparently experiences some difficulty in reaching that result.

In Missouri it is too well settled by precedents to admit of doubt that no such conversation could be given in evidence with the force of an admission by defendant: *Price v. Thornton* (1846), 10 Mo. 135; *Rogers v. McCune* (1854), 19 Mo. 558; *McDermott v. Hannibal etc. R. R. Co.* (1881), 73 Mo. 516; 39 Am. Rep. 526; *Adams v. Hannibal etc. R. R. Co.* (1881), 74 Mo. 553; 41 Am. Rep. 333; *Aldridge v. Midland etc. Co.* (1883), 78 Mo. 559; *Devlin v. Wabash etc. Ry. Co.* (1885), 87 Mo. 545.

The conductor was employed to represent the company in the management and control of its train. The company was answerable for his actions within the fair scope of that employment. But the company was certainly not bound by any declaration of his motives which did not accompany, or form part of some act or transaction within the apparent line of the service for which he was employed.

But it is needless to again go over the ground ¹⁴⁹ which the last group of decisions covers. Under those cases it is plain that, if the conversation between the witness and the conductor in this case has any proper standing as evidence, it cannot be as an admission, but must be as a part of that essential or descriptive matter belonging to the main transaction itself which the law calls *res gestæ*, for want of any English term equally expressive.

It is far from my present purpose to attempt any sort of definition of *res gestæ*. Definitions are, no doubt, useful and necessary to impart general conceptions of the subjects with which jurisprudence deals; but they do not always suffice to solve the difficulties met in the practical administration of law.

In the case at hand, the trainmen ejected the plaintiff from the train a few minutes, at least, before the conversation in.

question took place. The former act is the fact with which the conversation must be connected as a circumstance, to bring the conversation properly into the *res gestæ*.

The conversation had two distinct bearings as a piece of evidence: 1. It embraced an implied admission that the conductor had put the plaintiff off the train; and 2. It indicated motive, that is to say, hostility to plaintiff. Proof of the former we might overlook as harmless, having no prejudicial effect on defendant's rights; for both sides admitted that plaintiff was ejected from the train: *La Duke v. Township of Exeter* (1893), 97 Mich. 450; 37 Am. St. Rep. 357.

But upon the question of the conductor's motive of hostility to plaintiff in ejecting him, the conversation was vitally material, and could not justly be considered harmless, in view of the issue of exemplary damages which the court saw fit to submit to the jury. The plaintiff was not entitled (as against the present ¹⁵⁰ defendant) to prove that motive by a declaration of the conductor after the fact, as the Missouri cases already mentioned show.

The interval of time after the main fact is not, of itself, of controlling importance, though entitled to weighty consideration in determining what are *res gestæ*. The testimony indicates that the conversation of the witness with the conductor had no connection whatever with the scene out of which the alleged cause of action arises. Nor was the conductor's statement in any way connectible with that scene as a circumstance of it. It was an entirely independent event, notwithstanding it occurred within a comparatively short time after the act in which plaintiff played a part. But, so far as concerns any relation between the ejection of plaintiff and the conversation, the latter might as well have occurred eight or ten days, as two or three or ten minutes, afterward.

Mere thoughts or feelings, engendered by a particular occurrence or fact, do not, in my opinion, form of themselves a sufficiently substantial connecting link between the fact and the subsequent talk of an eyewitness about it to make that talk a part of the *res gestæ* of the fact. The suggestion to that effect in the learned opinion of my brother Macfarlane does not, with due respect, seem to me maintainable in its application to the case at bar.

Without attempting to declare any general rule as to what matters constitute *res gestæ*, and confining the ruling to the

immediate facts of this case, it would seem to me very clear (were it not for the contrary opinion of some of my associates) that the conductor's declaration is no part of the *res gestæ* in the case before us.

¹⁵¹ In my opinion the court should have excluded it.

2. Nor can it matter in the result that the defendant's counsel on cross-examination asked the witness to repeat his account of the interview with the conductor. That course did not amount to a waiver of the right to urge the exception already saved to the ruling of the court in admitting that interview.

Counsel might properly conform to that ruling for the purposes of the trial, without thereby waiving the right to review the admission of incompetent evidence that had come in, over his objection. After that evidence was before the jury he might then combat it, or meet it, as best he might, without waiving the exception already taken: *Tobin v. Missouri Pac. R. R. Co.* (Mo., Nov. 23, 1891), 18 S. W. Rep. 996; *Martin v. New York etc. R. R. Co.* (1886), 103 N. Y. 626.

In my opinion the judgment should be reversed and the cause remanded for the reasons above given.

It is so ordered.

GANTT, SHERWOOD, and BURGESS, JJ., concur.

BLACK, C. J., and BRACE and MACFARLANE, JJ., dissent.

Mr. Justice MACFARLANE dissented, and contended that the declarations of the conductor made after the act of expulsion of the passenger had been completed were admissible in evidence as part of the *res gestæ*. He said: "As a rule, derivative, or hearsay, evidence is not admissible to prove the fact admitted or declared. The person who makes the statement should be called to testify to the fact in order that, by the test of an oath and of cross-examination all the circumstances may be developed, and the weight to be given to the evidence determined. Giving in evidence the uncorroborated and interested declaration of a third person for the purpose of proving the truth of the fact declared, and thereby binding a party to the suit, should never be permitted, unless the declaration was made at such a time and under such circumstances as will raise the presumption that the one making it spoke the truth. All the authorities agree that such declarations are admissible when they form a part of and characterize the fact or transaction to be proved. They then become verbal acts, and are admissible as such, and not, strictly speaking, as declarations or admissions. They form a part of the *res gestæ*."

"One of the exceptions to the general rule, that hearsay evidence is not admissible, is applied to the declarations and admissions of an agent when offered to prove an act or transaction with which the principal is charged. The exception is only made when the declaration constitutes a part of the

principal fact to be proved. The declaration of an agent is not binding on the principal, unless it falls within this exception. What constitutes a part of the *res gestæ*, in any case, whether affecting the admissibility of the declarations of an agent or of the declarations of third persons, is determined by precisely the same rules. . . .

"The rule is that evidence of words or acts may be admissible (notwithstanding the general rule against derivative evidence) on the ground that they form part of the *res gestæ*, provided that the act which they accompany is itself admissible in evidence, and that they reflect on or qualify that act. But they must be so connected with the main fact under consideration as to illustrate its character, to further its object, or to form, in conjunction with it, one continuous transaction. If declarations are made some time before the act, and stand alone by themselves, they are not within the rule and are not admissible. . . . But if declarations of a past occurrence are made under such circumstances as will raise the reasonable presumption that they are the spontaneous utterances of thoughts created by, or springing out of, the transaction itself, and so soon thereafter as to exclude the presumption that they are the result of premeditation and design, they will be admissible as part of the *res gestæ*: 21 Am. & Eng. Ency. of Law, 99.

"When the declaration of an agent is offered to prove and charge the principal with an act, resulting in personal injury to another, all the circumstances should be considered, the time and place at which made, the nature and effect of the act and injury, the excitement, fright, and other mental conditions of the agent making the declaration, and of other persons. If, from all these circumstances, the court is satisfied that the agent, without time to premeditate, expressed truly and spontaneously his thoughts in regard to a fact within his knowledge and in issue, and to prove which he would have been a competent witness, the evidence would be admissible.

"It will be seen that exact coincidence of time between the act and declaration, though an important circumstance, cannot be made a positive test of the admissibility of such declarations. In case of a derailment of a train, or a collision, there is often no time for previous declarations, but in view and presence of the excitement, the horror and the sympathy, spontaneous declarations of the agent, as to the cause of the disaster, would carry with them convictions of their truth.

"That coincidence of time is not the true test may be drawn from our own decisions. In *Harriman v. Stowe*, 57 Mo. 93, admissions made an hour or more after the accident were admitted. This case goes beyond any recognized rule, and would not probably be followed under any circumstances. In *Adams v. Railroad*, 74 Mo. 553, 41 Am. Rep. 333, after deceased had been struck, after the train had been stopped, two of the trainmen went back to the place of the collision. Held, that statements then made by them were not admissible. And generally it has been said, though probably unnecessary to the particular decision, that such declarations to be admissible should be coincident with the events to which they relate: *Devlin v. Railroad*, 87 Mo. 545; *Aldridge v. Midland etc. Co.*, 78 Mo. 565; *McDermott v. Railroad*, 87 Mo. 298.

"The question was last considered and the authorities reviewed in *Leahy v. Railroad*, 97 Mo. 172, 10 Am. St. Rep. 300. While the declarations in that case were those of the injured person, the principle upon which they are made admissible is the same. The court, after a careful consideration, reached the following conclusion: "The better reasoning is, that the decla-

ration, to be a part of the *res gestæ*, need not be coincident, in point of time, with the main fact to be proved. It is enough that the two are so clearly connected that the declaration can, in the ordinary course of affairs, be said to be the spontaneous explanation of the real cause. The declaration is then a verbal act, and may well be said to be a part of the main fact or transaction. Again, if the subsequent declaration and the main fact at issue, taken together, form a continuous transaction, then the declaration is admissible. Much, therefore, depends upon the nature and character of the transaction in question, for it may be, and often is, of a continuing character. It cannot be said that a mere subsequent declaration will, of itself, furnish a sufficient connecting circumstance.'

"Now let us apply these principles to this case. The principal fact to be proved was the manner in which plaintiff was ejected from the train. Evidence that the expulsion was wantonly done was admissible. The conductor was a competent witness to prove the manner in which the expulsion was made, and he had knowledge of the fact. Evidence by the conductor that, when he ejected plaintiff, he was indifferent as to the consequences to him would have been competent. Declarations of the conductor made while in the act of the expulsion, which were indicative of malice and wantonness, could have been proved under all the authorities.

"We are of the opinion, taking into consideration the time and place in which it was made, the character of the act, and all the circumstances surrounding it, that the declaration admitted in evidence was so connected with the expulsion of the plaintiff, as to show that what was said on the occasion was the spontaneous expression of the thoughts and feelings of the conductor at the time the act was done, and to characterize the act itself. The conversation occurred within a few seconds after plaintiff was put off. The conductor leaving the scene and Johnson approaching it, they met before the former had passed the length of the car. The conductor was required to use some force, and was necessarily more or less excited. The night was dark and stormy. The train was running on an embankment three feet high. When plaintiff was expelled he fell upon the ground seven feet from the track and his leg was broken in two places. The evidence tends to prove that while the conductor signaled the engineer to stop the train plaintiff was expelled before it came to a stop. In these circumstances, almost in the very presence of the scene of the expulsion, with the train leaving plaintiff in the storm and darkness, the witness expressed sympathy for him, and a fear that he had been injured, and asked that he be taken on board again. In these circumstances the declaration, which shows anger, ill-will, and perfect indifference to the result, is made by the conductor.

"I experience no difficulty whatever in reaching the conclusion that the declaration was sufficiently connected with the fact to be proved to form a part of the act itself, and to characterize it. Indeed, to reach any other conclusion, under the evidence as contained in the record, would result in overruling the latest and most carefully considered cases of this court, and in setting at naught well-established principles of the law of evidence, as declared by the most respectable courts and text-writers of this country. Black, C. J., and Brace, J., agree with me."

AGENCY.—**STATEMENTS MADE BY AN AGENT** are admissible in evidence only when they form part of the *res gestæ* and are made *dum ferver opus*: *Summers v. Hibbard*, 153 Ill. 102; 46 Am. St. Rep. 872, and note, with the cases collected. The foregoing doctrine as applied especially to the agents

or servants of railroad companies is treated at length in the notes to *Durkee v. Central Pac. R. R. Co.*, 58 Am. Rep. 565, and *Hawker v. Baltimore etc. R. R. Co.*, 36 Am. Rep. 829.

EVIDENCE—DECLARATIONS WHEN PART OF THE RES GESTÆ.—To make a declaration a part of the res gestæ it must be a part of the principle act, and so a part of the act, itself. Therefore, an insulting remark made by a brakeman immediately after the infliction of an injury by his negligent act is not admissible against his employer unless calculated to qualify the principal act: *Butler v. Manhattan Ry. Co.*, 143 N. Y. 417; 42 Am. St. Rep. 738, and note. See, also, *Brie etc. R. R. Co. v. Smith*, 125 Pa. St. 259; 11 Am. St. Rep. 895, and note, and the extended note to *People v. Vernon*, 95 Am. Dec. 52, and the note to *Ohattanooga etc. R. R. Co. v. Liddell*, 21 Am. St. Rep. 178.

GRIMES v. EDDY.

[126 MISSOURI, 168.]

EVIDENCE.—COURTS TAKE JUDICIAL NOTICE of the fact that Texas cattle have some contagious or infectious disease communicative to native cattle outside that state.

RAILROADS—NEGLIGENCE—"TEXAS FEVER."—A railroad company negligently permitting Texas cattle to escape from its custody while in transportation is liable in damages for the loss of native cattle thereby infected with "Texas fever."

CONSTITUTIONAL LAW—PART OF A STATUTE MAY BE UNCONSTITUTIONAL and void and another part valid, even though the incongruous provisions be contained in the same section, if when the unconstitutional portion is stricken out that which remains is complete in itself and capable of being enforced according to the legislative intent, independent of that which is rejected. A statute may also be valid as to some classes of cases, and void as to others.

CONSTITUTIONAL LAW—INTERSTATE COMMERCE.—A statute forbidding transportation of diseased or infected livestock through the state is void as an attempt to regulate or prohibit interstate commerce.

CONSTITUTIONAL LAW.—IMPORTATION OF DISEASED OR INFECTED LIVESTOCK into the state may be prohibited by statute, which may prescribe the kind of cars to be used for their transportation, as well as other reasonable and precautionary measures.

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—DISEASED ANIMALS.—Although a state has no power to prohibit the transportation of infected livestock through it by common carriers, it has the right to restrict the manner and mode of such transportation to railroads and steamboats, if necessary to prevent the spread of contagion and disease.

Jackson & Montgomery, for the appellants.

R. N. Bodine and Stocking & Alexander, for the respondent.

171 BURGESS, J. This is an action to recover the value of a cow alleged to have died from Texas fever contracted from cattle shipped over the Missouri, Kansas & Texas Railway,

while the same was being operated by the defendants as receivers. The suit was commenced before a justice of the peace in Monroe county, and appealed to the circuit court. The statement is in two counts, and, leaving off the caption, is as follows:

“Plaintiff says that the Missouri, Kansas & Texas Railway Company was, on and after the day hereinafter mentioned, and now is, a railroad corporation organized under the laws of the state of Kansas, and that at the time hereinafter mentioned defendants ¹⁷² Geo. A. Eddy and H. C. Cross were, and now are, receivers of the said Missouri, Kansas & Texas Railway Company, appointed by the United States circuit court for the eighth judicial circuit, and as such receivers were at said date, and now are, in possession of the railroad of said corporation known as the Missouri, Kansas & Texas Railroad, running through the county of Monroe in the state of Missouri, and as said receivers engaged in running and operating the same, and doing a general railroad business over and on said railroad.

“Plaintiff states that on or about the — day of May, 1890, defendants, as such receivers, were engaged in transporting upon said railroad, and had upon their cars while so transporting through Monroe county, Missouri, a large number of Texas cattle, said cattle being at said time infected with a deadly disease known as Texas fever; that all Texas cattle during the spring and summer months, whether perceptibly affected by said disease or not, communicate the same to all cattle raised in Missouri passing over land previously passed over by such Texas cattle; that defendants at said time well knew that said cattle were Texas cattle, that they were infected with said disease, and of the liability aforesaid to communicate said disease to Missouri raised cattle by leaving the germs of said disease upon the ground over which they traveled, and that defendants as such receivers, so knowing, and while said Texas cattle were by them being transported across Monroe county, Missouri, wrongfully and negligently, by their servants and employees, permitted said Texas cattle, so infected with said disease, and so liable to communicate said disease as aforesaid, whether apparently affected themselves or not, to escape from the control and custody of said defendants and run at large over a large area of land in Monroe county, Missouri, including public highways, for a space of ¹⁷² twelve hours

or more; and that plaintiff then and there being the owner of a certain Missouri raised cow of the value of one hundred and twenty-five dollars, the same, without any fault or negligence of plaintiff, passed over the ground over which said Texas cattle had passed as aforesaid, and thereby the said disease of Texas fever was communicated to plaintiff's cow, whereby she sickened and died, so that she was wholly lost to plaintiff, whereby he was damaged in the sum of one hundred and twenty-five dollars, for which he asks judgment.

"Plaintiff, for another cause of action against defendants, as receivers as aforesaid, states that the Missouri, Kansas & Texas Railway Company was, on and after the days hereinafter mentioned, and now is, a railroad corporation organized under the laws of the state of Kansas, and, at the time hereinafter mentioned, defendants were, and now are, the receivers of the said Missouri, Kansas, & Texas Railway Company, appointed by the United States circuit court for the eighth judicial circuit, and, as such receivers, were, at said dates and now are, in possession of the railroad of said corporation known as the Missouri, Kansas & Texas Railroad, running through the county of Monroe in the state of Missouri, and, as such receivers, engaged in running and operating the same and doing a general railroad business over and on said railroad. Plaintiff states that on or about the — day of May, 1890, defendants, as such receivers, were engaged in transporting upon said railroad, and had upon their cars while so transporting through Monroe county, Missouri, a large number of Texas cattle, at said time being affected with the disease known as Texas fever; that defendant at said time well knew that said cattle were Texas cattle, and were affected with Texas fever; that said cattle, while being so transported by defendants, were permitted by defendants to escape from the cars in said Monroe county, and to run at large over a ¹⁷⁴ large area of land in said county along the route and in the vicinity of said railroad, including public highways, for the space of twelve hours or more, and that plaintiff then and there being the owner of a certain native Missouri raised cow of the value of one hundred and twenty-five dollars, the same, without any fault or negligence on the part of the plaintiff, passed over the ground over which said Texas cattle had passed, as aforesaid, and thereby the said disease of Texas fever was communicated to plaintiff's said cow, whereby she sickened and died, so that she was wholly lost to plaintiff, whereby

he was damaged in the sum of one hundred and twenty-five dollars; wherefore plaintiff says that under the provisions of sections 953 and 954 of the Revised Statutes of Missouri, 1889, he is entitled to recover from defendants the sum of one hundred and twenty-five dollars, for which he asks judgment."

To the statement defendants filed an answer denying all the allegations contained therein. A separate trial was had on each count, resulting in a verdict and judgment for plaintiff on both counts.

It was by stipulation admitted that the cattle, which it is claimed caused the injury, were shipped from Sinton, in San Patricio county, Texas, over a line of railroad connecting with that operated by the defendants at West Point, Texas, and then delivered to the defendants, consigned to Chicago, Illinois. Said cattle were shipped May 16, 1890, and reached Paris, Monroe county, on the morning of May 21, 1890, while en route to Chicago. As the cars going eastward toward the depot passed over the switch, they were wrecked. The engine and several cars loaded with coal went over the switch safely, but the rear trucks of one coal-car and the cars in which these cattle were loaded were thrown from the track and the balance of the train remained standing on the track in a westerly direction from the wreck. One of the ¹⁷⁵ cattle cars was broken in at one end, and some of the cattle escaped in this way. The cars were thrown over to one side, and the cattle all thrown together at one end, and it became necessary to remove them speedily to prevent them smothering. This was done by opening the side doors, pulling them out with ropes, etc.

The town of Paris lies nearly wholly south of the railway, and there is no street across the railway track west of where the wreck occurred. The depot and stockyard are east of the place of the wreck; the stockyard on the north side of the track. At the place of the wreck the right of way on the north side abuts upon inclosed land, and just east of the wreck, and opposite where the forward part of the train stood, is located a section-house and tool-house. The right of way opposite the wreck was also inclosed ground. The wrecked cars were thrown toward the south, a coal-car striking a telegraph pole, and bearing it down upon the wire fence close to where it stood. The train in the rear of the wreck stood on the track reaching back the length of some fifteen or sixteen cars to a trestle or fill. So that, between the wreck and the

fill, there was no way to pass from the south side of the track to the north side, because of the cars in the train standing on the main track. A short distance west of the wreck, and south of the railway, is a little open piece of ground through which a road runs from its connection with the regularly laid out streets of the town to a road crossing the railway, through a gate into private grounds lying north of the track. The cars of the train not wrecked stood across this crossing. As the cattle escaped from, or were removed from the wrecked cars, they were scattered along the right of way south of the track, and between the wreck ¹⁷⁶ and the road crossing west of the wreck about one hundred and fifty feet.

Plaintiff's evidence showed no efforts of anyone, save the trainmen and railroad employees, to stop the cattle from wandering off. They did nothing with the cattle that night, as they were wild, vicious, and unmanageable. By daylight the next morning the cattle had wandered out over the streets of Paris, and upon open grounds, some going as far as a mile in the country, and it was 10 o'clock A. M. before they were all driven into the railroad stockpens by horsemen.

The testimony showed that all Texas cattle contain in their system a parasite or germ which is harmless to them; that it simply acts upon their system as vaccine does upon a human being, inoculating them, and rendering them free from all danger from the disease; that they are not diseased themselves, but, on the contrary, are inoculated against the disease, and do not die from it, unless they are brought to a colder climate, and get rid of the parasite, and are then again subject to the disease, in which event it is as fatal to them as it is to native cattle. There was no indication of any disease in the Texas cattle that escaped at Paris. The evidence also showed that native cattle walking over the same ground where the Texas cattle had been, or eating from the same hay, or drinking from the same pool of water, would contract the Texas fever, and that over twenty head belonging to different persons in Paris, and which had thus been exposed to the disease, did, in a few days thereafter, contract and die from the Texas fever, and, among the rest, the cow of plaintiff.

The evidence on the part of the defendants showed that, at the time of the wreck, the train was running at the rate of eight to ten miles per hour; that the engine and three or four cars passed over the switch safely, but that the rear

trucks of a coal-car went on the ¹⁷⁷ switch track and the forward trucks on the main line, and the wreck resulted. An examination of the switch revealed the fact that the rod connecting the switch with the target and shaft had been detached. The pin which held the gooseneck with which the connection had been made had been removed, and carried or thrown away, and the connection made by the gooseneck broken. The result was that the moving cars passing over the track at the switch misplaced or opened the switch, and the forward trucks, passing over in safety, remained on the main track, but the rear trucks of the same car were, by reason of the moving of the switch, sent on the switch track. The stone used in separating the connection was found, and the marks on it and the iron connection were plainly seen. Similar wrecks and attempts at wrecks had been made on the line of defendants' railway during the same season, and in the same location. As soon as they could do so, defendants had the cattle collected, and placed in the stockpens of the railroad company.

At the close of plaintiff's evidence, defendants interposed a demurrer thereto, which was overruled. Under the instructions of the court there was a verdict for plaintiff on each count in the complaint. Defendants then filed a motion for new trial and in arrest of the judgment, which being overruled, they appealed to this court.

The first contention of defendants is, that the demurrer to the evidence under the first count in the statement should have been sustained, for the reason that it failed to support the averments in the statement in that it failed to show that the Texas cattle which were permitted to escape were infected with a dangerous or deadly disease, and that the defendants knew it, and ¹⁷⁸ that they negligently permitted the cattle to escape from their custody or control.

The cause of action stated in the count now under consideration being one at common law, before plaintiff was entitled to recovery thereunder it devolved upon him to show, not only that the Texas cattle were infected with a dangerous and deadly disease, microbe, or parasite, and that the disease was communicated to his cow, by reason of which she died, but it devolved upon him to show that defendants knew, or that it was a notorious fact, that all Texas cattle were so diseased or so infected, and that it was by their negligence, or that of their employees, that they were permitted to escape from their

custody or control. While the proof did not show that the cattle were themselves, in fact, diseased, it is of general notoriety that all cattle in that part of Texas from which these cattle were shipped are infected with a microbe or germ of disease which is taken in by Missouri cattle by injection; that is, taken into the system through the stomach by eating grass over which Texas cattle have traveled, or by drinking water from pools or streams through which they have passed and deposited the germ by dropping, or from ticks.

Plaintiff undertook to fix notice on defendants of the infection of the cattle by proof of notoriety of the fact that all Texas cattle are affected with what is called Texas fever, and will impart that fever to native cattle under certain conditions.

In respect of animals of a wild nature, such as beasts of prey, or animals by nature vicious, the owner is responsible for any damages occasioned by them, whether or not he knew of their habits or disease: *Canefox v. Crenshaw*, 24 Mo. 199; 69 Am. Dec. 427.

While at common law it was the duty of every man to restrain his cattle within his own inclosure and ¹⁷⁹ for failing to do so he was liable for their trespasses and for injuries resulting from disease communicated by them, whether he voluntarily permitted them to go at large or not (Cooley on Torts, 2d ed., 397), as to domestic animals, the common law does not fix any liability on the owner for damages done by them when at large on the ground of negligence, unless it be proven that the owner knew that the animals were mischievous or dangerous: *Lyke v. Van Leuven*, 4 Denio, 127; Cooley on Torts, 2d. ed., * 341, * 343; *Dearth v. Baker*, 22 Wis. 73; *Vrooman v. Lawyer*, 13 Johns. 339; *Missouri Pac. Ry. Co. v. Finley*, 38 Kan. 550; *Patee v. Adams*, 37 Kan. 133.

In *Bradford v. Floyd*, 80 Mo. 207, which was an action for damages occasioned to plaintiff's cattle by contact with what were known as Texas cattle, it was held that, while the evidence showed that the defendant knew that they were Texas cattle, before defendant could be held liable for damages caused by disease communicated by them to plaintiff's cattle, it must be shown that defendant knew that his cattle were diseased. The same rule was announced in *Missouri Pac. Ry. Co. v. Finley*, 38 Kan. 550, and *Patee v. Adams*, 37 Kan. 133.

Since those cases were decided, scientific investigation

demonstrated, and it is now a matter of general information or knowledge, that Texas cattle are not, in fact, diseased themselves, so as to render them unhealthy for food, but that all Texas cattle are infected in their systems with a parasite or germ, which is harmless to them, but which when taken into the stomach by native cattle produces what is known as Texas fever. In *Kimmish v. Ball*, 129 U. S. 217, it was said: "That cattle coming from those sections of the country during the spring and summer months are often infected with a contagious and dangerous fever is a notorious fact."

¹⁸⁰ If, then, it be a notorious fact, courts will take judicial notice thereof, and no proof is required. So it is said that: "Courts will generally take notice of whatever ought to be generally known within the limits of their jurisdiction": *Greenleaf on Evidence*, 14th ed., sec. 6. "If a fact, alleged to exist, and upon which the rights of parties depend, is within common experience and knowledge, it is one of which courts will take judicial notice": *Minnesota v. Barber*, 136 U. S. 313; *Brown v. Piper*, 91 U. S. 37-42; *Phillips v. Detroit*, 111 U. S. 604, 606.

Whatever difference of opinion may have at one time existed as to the cause and character of what is known as Texas fever, and the manner in which it is communicated to native cattle of the state, yet the fact is of common knowledge that the disease is imparted under certain conditions by Texas cattle. This peculiar characteristic and its notoriety is recognized by this and many other states, as is shown by the various legislation with respect thereto as well as by regulations in the markets of the country which require this class of cattle to be kept separate from others.

From these considerations it would seem that the case of *Bradford v. Floyd*, 80 Mo. 207, in so far as it holds that courts will not take judicial notice of the fact that Texas cattle have some contagious or infectious disease communicative to native cattle, should be overruled.

Plaintiff was permitted to prove, over the objections of defendants, that it was a matter of universal knowledge that Texas cattle were infected with an infectious disease communicable to native cattle, and while, from what has been said, such proof was entirely unnecessary, it is impossible to see how defendants could have been prejudiced thereby.

As the railway company owed no duty to the plaintiff, what produced or caused the wrecking of the train ¹⁸¹ was

of no consequence, except for the purpose of showing how the cattle escaped from the custody of defendants or their employees, the inquiry being whether the escape was because of their carelessness or negligence. If so, as it was a notorious fact that the cattle were infected with microbes or parasites which were liable to communicate to domestic cattle traveling over the ground after them, or eating grass over which they had passed or their droppings had fallen, the Texas fever, and the plaintiff's cow had contracted the disease in that way, from which she died, the plaintiff is entitled to recover.

As to whether or not the cattle were permitted to escape from the custody of defendants' employees after the wreck, by reason of their carelessness or negligence, was one to be passed upon by the jury under proper instructions from the court, and we are not prepared to say that there was not sufficient evidence upon which to predicate such instructions.

The instructions that were given under this count in the complaint presented the law of the case very fairly to the jury.

The second count of the statement is predicated upon sections 953 and 954 of the Revised Statutes of 1889. They read as follows:

"SEC. 953. Every person shall so restrain his diseased or distempered cattle, or such as are under his care, that they may not go at large off his own premises or the land to which they belong; and no person shall drive any diseased or distempered cattle affected with what is commonly known as Texas or Spanish fever, or any other infectious disease, into or through this state, or from one place therein to another, unless it be to remove them from one piece of ground to another of the same owner; and no railroad company or owners of a steamboat, or any other company or person, shall ¹⁸² bring into or transport through this state, or from one part thereof to another, any Texas, Mexican, Cherokee, or Indian cattle affected with what is commonly known as Texas or Spanish fever, or any other contagious disease, epidemic, or pestilence."

"SEC. 954. Any person or persons, railroad company, or owner or owners of any steamboat, who shall offend against or violate any of the provisions of the next preceding section, shall be liable for all damages sustained on account of such Texas or Spanish fever, or other infectious disease, being communicated from any such diseased animal or cattle to

any other animal or cattle in the neighborhood or along the line of such transportation, or removal of such diseased animal or cattle into or through this state, or from one part thereof to another; and the existence or presence of such Texas or Spanish fever, or other contagious or infectious disease, among the native cattle of this state, on the same range with or in the vicinity of any such Texas, Mexican, Cherokee, or Indian cattle, or along the line or route over which they were removed or transported, shall be prima facie evidence that the same were affected with such disease at the time of being so removed or transported, and communicated it to such native cattle so affected therewith."

It is claimed by defendants that the statute is unconstitutional and void as being an attempt to regulate commerce between the states; that the clause in the statute making the existence of Texas or Spanish fever, or other contagious or infectious diseases, among the native cattle along the line of railways along which Texas cattle may be transported, prima facie evidence that the cattle being so transported were diseased, include a condition or affection which is the normal or natural state of all Texas, Mexican, Cherokee, or Indian cattle, and that, as the evidence shows that all such ¹⁸³ cattle are alike affected, that they all have the parasite in their system, which communicates a disease called Texas fever to native cattle (and if the language of the statute is broad enough to cover such a construction), then it is a regulation of commerce, under the decision in *Railroad Co. v. Husen*, 95 U. S. 465.

It was held in that case that a statute which prohibited driving or conveying any Texas, Mexican, or Indian cattle into this state, between the first day of March and the first day of November in each year, was in conflict with the clause of the constitution that provides that Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes. But in the same opinion the right of a state to pass laws to prevent animals suffering with contagious or infectious diseases from being brought into such state and to exclude them therefrom is recognized. The court says: "It may also be admitted that the police powers of a state justifies the adoption of precautionary measures against social evils. Under it a state may legislate to prevent the spread of crime, or pauperism, or disturbance of the peace. It may exclude from its limits

convicts, paupers, idiots, and lunatics, and persons likely to become a public charge, as well as persons afflicted by contagious or infectious diseases—a right founded, as intimated in *The Passenger cases*, 7 How. 283, by Mr. Justice Greer, in the sacred law of self-defense: See *Tomlinson v. Hewitt*, 2 Saw. 283. The same principle, it may also be conceded, would justify the exclusion of property dangerous to the property of citizens of the state; for example, animals having contagious or infectious diseases. All these exertions of power are in immediate connection with the protection of persons and property against noxious acts of other persons, or such a use of property as is injurious to the property of others. They are ¹⁸⁴ self-defensive”: See, also, *Minnesota v. Barber*, 136 U. S. 313; *Kimmish v. Ball*, 129 U. S. 217.

In the case last cited, the court, in speaking of *Railroad Co. v. Husen*, 95 U. S. 465, says: “The decision in that case rested upon the ground that no discrimination was made by the law of Missouri in the transportation forbidden between sound cattle and diseased cattle; and this circumstance is prominently put forth in the opinion.” Since the decision in the *Husen* case the statute has been amended, and section 953 provides that “every person shall so restrain his diseased or distempered cattle, or such as are under his care, that they may not go at large off his own premises or the land to which they belong; and no person shall drive any diseased or distempered cattle affected with what is commonly known as Texas or Spanish fever, or any other infectious disease, into or through this state, or from one place therein to another, unless it be to remove them from one piece of ground to another of the same owner, and no railroad company or owners of a steamboat, or any other company or person, shall bring into or transport through this state, or from one part thereof to another, any Texas, Mexican, Cherokee, or Indian cattle affected with what is commonly known as Texas or Spanish fever, or any other contagious disease, epidemic, or pestilence.”

In *Gilman v. Philadelphia*, 3 Wall. 713, 730, it is held that, ‘under quarantine laws, a vessel registered or enrolled and licensed may be stopped before entering her port of destination, . . . and a bale of goods upon which the duties have or have not been paid laden with infection may be seized under ‘health laws,’ and, if it cannot be purged of its poison, may be committed to the flames.”

The purpose of the statute is not to interfere with the commerce between the states, but is to exclude ¹⁸⁵ from the state and to prohibit the importation thereto of cattle having contagious or infectious diseases, and therefore exclusively for the protection of the property of the citizens of this state against the acts of such persons as use their property in such a way as is dangerous and detrimental to the interest of others. In speaking of the Kansas statute, enacted for the same purpose, in *Missouri Pac. Ry. Co. v. Finley*, 38 Kan. 550, it is said: "If this law is not constitutional and within the police power of the state, then the state is absolutely powerless to protect the property of its citizens. If this and similar statutes are in conflict with the constitution of the United States, the state is wholly disarmed and defenseless to exclude property from the state that is dangerous and injurious to the property of its citizens."

But it is argued that, as all Texas cattle, though not diseased, have the means, power, or quality, by reason of their nativity and their usual and normal condition, to communicate disease to native cattle, then it must include all cattle coming from the south, and amounts to an absolute inhibition of their shipment into or through this state. Grant it that such is the effect, yet it seems clear that if they are diseased, or infected with a parasite which they communicate to and which destroys native cattle, the state has the same right, as a police regulation for the protection of the property of her citizens, to prohibit their importation into the state as it would have to prohibit the importation of persons affected or infected with some contagious and deadly disease.

A part of a statute may be unconstitutional and another part valid, even though the incongruous provisions be contained in the same section, or it may be unconstitutional with respect to its effect upon certain subjects or things embraced within its scope and ¹⁸⁶ application, and constitutional as to others. If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being enforced according to the legislative intent, independent of that which is rejected, to the extent of the conflict and repugnancy it may not be enforced, while it is otherwise as to the provisions not repugnant to the constitution.

Thus, that part of the statute which prohibits any railroad company, or owner of a steamboat or any other company or

person from bringing into this state, for the purpose of transportation through the same, any of the diseased cattle of the kind and character mentioned in the act, may be held unconstitutional, and that part which prohibits the bringing into the state, or the driving on foot, of such cattle from one part of it to another may be upheld as a police regulation. Shipping such cattle by railroad or steamboat is attended with but little, if any, danger, as it is only when they come in contact with the ground with their feet, or by their droppings on the ground, that they are capable of imparting the fever to native cattle. While the state has no power to prohibit the transportation of articles of commerce through it by common carriers, railroads, and steamboats, it has the right to restrict the manner and mode of taking animals infected with parasites, by which they communicate disease to native cattle, and to confine that mode to railroads and steamboats, if necessary, in order to prevent the spread of disease and contagion which results in the destruction of the property of her citizens.

"To the extent of the [such] collision and repugnancy the law of the state must yield, and to that extent, and no further, it is rendered by such repugnancy inoperative and void": *Commonwealth v. Kimball*, 24 Pick. 359; 35 Am. Dec. 326. It was held in *Donnersberger v. ¹⁸⁷ Prendergast*, 128 Ill. 229, that "because a portion of a statute is unconstitutional it does not follow that the court may declare its other provisions void, if they are separable, and the valid portions are capable of enforcement, independently of such void provision, unless it shall appear that all of the provisions of the act so depend on each other, operating together for the same purpose, or are otherwise so connected together in meaning that it cannot be presumed the legislature would have passed the one without the other." "A legislative act may be entirely valid as to some classes of cases and clearly void as to others": Cooley's Constitutional Limitations, 6th ed., 213. Thus it has been held that the law prohibiting the sale of liquors may be void as to imported liquors and valid as to all other: *State v. Amery*, 12 R. I. 64; *Tiernan v. Rinker*, 102 U. S. 123.

The power to prevent the importation of diseased or infected cattle into the state, and the power to prevent the transportation of such cattle through the state over the great thoroughfares, railroads, or by river, rest upon very different principles; the one, as has been seen, may be regulated or

prohibited by the state in the exercise of its police power, while the other is a plain regulation of interstate commerce, a regulation extending to prohibition. Cattle thus transported are articles of commerce, and whatever may be the power of the state over commerce that is altogether confined within its borders, it cannot prohibit or regulate that which is interstate. Texas cattle, as a general thing, while having that peculiarity, not possessed by native cattle, of transmitting or communicating to them, through a microbe or parasite carried in their bodies, the Texas fever, are wholesome food and extensively used for that purpose, and are to be found for sale as beef in many of the markets of the different states. ¹⁸⁸ The burdens imposed upon railroads for transporting them through the state are onerous because of their liability to escape from the cars, and in that way, and otherwise, communicate disease to native cattle, and, to prevent such occurrence, the state, as a police regulation, would clearly have the right to prescribe the kind of cars in which they shall be transported, and such precautionary measures as may be reasonably necessary for that purpose. The transportation of property from one state to another is clearly a branch of interstate commerce, and the statute is unquestionably a plain interference with such transportation—in fact, an absolute inhibition against it. The effect of the statute is to obstruct interstate commerce, and to discriminate between the property of one state and that of citizens of other states, and, in so far as it prohibits the transportation of Texas, Mexican, Cherokee, and Indian cattle through the state by railroads and steamboats, conflicts with that provision of the constitution that provides that “Congress shall have the power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes”: *Leisy v. Hardin*, 135 U. S. 132; *Minnesota v. Barber*, 136 U. S. 313; *Crutcher v. Kentucky*, 141 U. S. 47.

The first clause of section 953, which provides that “every person shall so restrain his diseased or distempered cattle, or such as are under his care, that they may not go at large off his own premises or the land to which they belong,” has no application whatever to a case like the one in hand. It is evident, from a casual reading of it, that it only has application to cattle that are kept or herded upon some particular tract of land or premises.

The mischief intended to be prevented by the act was the

importation into this state of Texas, Mexican, ¹⁸⁹ Cherokee, and Indian cattle, by which a disease, commonly called and known as Texas fever, is communicated to domestic cattle, and, although the statute mentioned cattle affected or infected with Texas or Spanish fever, the evident intention of the legislature was to include such cattle as were infected with microbes or parasites, by which said fever is communicated. The act is entitled "An act to amend section 4358 of article two of chapter eighty-seven of the Revised Statutes of Missouri, entitled 'Of the restraint of diseased and Texas cattle'": Laws 1881, p. 40. Mr. Kent, in his Commentaries, volume 1, star page 461, says: "In the exposition of statutes . . . the intention of the law-giver will prevail over the literal sense of the terms; and its reason and intention will prevail over the strict letter. When the words are not explicit, the intention is to be collected from the context, from the occasion and necessity of the law, from the mischief felt, and the objects and the remedy in view; and the intention is to be taken or presumed, according to what is consonant to reason and good discretion." We must, therefore, hold that the statute is broad enough, when the object of the legislature is taken into consideration, to embrace cattle infected with microbes or parasites by which Texas fever is communicated to domestic cattle.

The judgment as to the first count is affirmed. As to the second count, the judgment is reversed.

All concur.

BARCLAY, J., concurs in the result.

ANIMALS—DAMAGES FOR CAUSING SPREAD OF DISEASE AMONG.—The principle is well established that the person by whose fault animals suffering from a contagious disease are placed in a position where they will, in the natural course of things, communicate the disease to other animals must respond in damages to the owner of the latter if he is, on his part, free from negligence: Extended note to *Gilson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 831, and note on Quarantine and Health Laws, *ante*, pp. 533-552.

STATUTES VOID IN PART.—Statutes partly void and partly valid may be enforced as to the valid part, provided it is separate from the void: *Birmingham etc. R. R. Co. v. Parsons*, 100 Ala. 662; 46 Am. St. Rep. 92, and note.

INTERSTATE COMMERCE—WHAT IS.—From the moment that an article of commerce commences to move from one state to another it becomes a subject of interstate commerce, and, as such, is subject only to national legislation: *Bennett v. American Exp. Co.*, 83 Me. 236; 23 Am. St. Rep. 774. This question is thoroughly discussed in the extended note to *People v. Wemple*, 27 Am. St. Rep. 558; where the further question as to the police

power of a state to pass laws restricting the transportation of articles from one state to another is also discussed.

TEXAS FEVER—LIABILITY FOR SPREAD OF.—Any person having in his possession Texas cattle shall be liable for any damages that may accrue from allowing such cattle to run at large, and thereby spread among other cattle the disease known as "Texas fever": *Kimmish v. Ball*, 127 U. S. 219, cited in the note to *State v. Goodwill*, 25 Am. St. Rep. 885.

WITTE v. STIFEL.

[126 MISSOURI, 295.]

NEGLIGENCE—INJURY TO TRESPASSING CHILD.—The owner of a city lot on which he is constructing a building is not liable for injury to a trespassing child caused by the falling of building stone while playing on the lot without the knowledge of the owner, or any express or implied invitation or inducement to enter upon the premises.

Dodge & Mulvihill and C. F. Joy, for the appellants.

Lubke & Muench, F. A. C. MacManus, and J. H. Grimm, for the respondents.

298 **BURGESS, J.** This action was instituted in the circuit court of the city of St. Louis by plaintiffs, father and mother, to recover five thousand dollars statutory damages for the death of their son, Robbe F. Witte, about seven years and nine months of age, alleged to have been occasioned by the negligence of defendants. Upon a trial had, at the close of the evidence, the court, at the instance of all the defendants, sustained a demurrer thereto, and instructed the jury that plaintiffs could not recover; whereupon plaintiffs took a nonsuit, with leave to move to set the same aside, and, their motion to that end being overruled, they appealed to this court.

The boy had gone to meet his father, who was a paper-hanger, on his return home from his day's work, and did meet him about one-half block from home in front of the building where the accident happened. The father met a gentleman at this point, and stopped to talk with him, during which time the boy went a short distance further on down the street, and the father went on home. As the boy returned a few minutes after, he met some other boys in front of the building, 299 and stopped to play with them in front of it on a pile of sand.

The cellar walls of the building were of stone, and about

completed, the window frames were in, stones placed over them, and the joists were laid. The building stood about three feet back from the street or building line, and the top of the wall was about three or four feet above the surface of the ground. There were two windows in the wall fronting the street, and over each there was a large flat cut stone, which would weigh about six hundred pounds, loose, not being placed in mortar. The lad went to one of the windows, placed his feet upon the sill, his hands upon the stone over the window as if to pull himself up, when it fell upon him and killed him almost instantly. His weight was about sixty-five pounds. The accident occurred near the sidewalk on one of the thoroughfares in the city of St. Louis. No brick had been laid on the building at the time of the accident. There was no fence to keep out persons, nor was there any warning of danger.

The defendant Michael Kriesky had nothing to do with the building, in any manner, until several months after the accident, when he rented and began to occupy it. Defendant Otto F. Stifel, in writing, contracted for the erection of this house by defendant Schott, according to plans and specifications prepared by defendants Beinke & Wees, architects, and the contract provided that these architects should superintend the construction of the building in accordance with these plans and specifications.

There was no evidence to show that defendant Stifel, in any way, took part in the construction of the building beyond the letting out of the contract therefor to defendant Schott and the taking of the latter's bond with satisfactory sureties for the faithful performance ³⁰⁰ of the contract. There was also no evidence to show that the architects did anything more about the construction of the building than the preparation of the plans and specifications and the assumption of the duty of superintending the construction in accordance therewith.

The evidence showed that defendant John Schott is a carpenter; that he undertakes the entire construction of buildings; that he was invited to the office of the architects, Beinke & Wees, and there examined the plans and specifications; that he then took, from different mechanics, subbids for such of the work and material needed to put up the building as did not fall within the line of his trade as carpenter, and that after he had all these subbids he made

one bid for the whole work, and was accepted as the original or principal contractor.

Among these subbids were those of defendants Molitor & Schwarz for the rubble or rough masonry, and of defendant John King for the cut stonework. These bids Schott accepted when he was awarded the entire contract. Defendants Molitor & Schwarz had finished the rubble masonry of the building when the boy was injured.

Defendant John King, as the subcontractor for the cut stonework, had, some days before the accident, laid or set the stone which the boy threw down upon himself. The evidence as to whether the stone had been laid in mortar or not was conflicting.

It may be conceded as a well-settled proposition of law that where no duty is owed there is no liability. But there is another rule of law, equally as well settled; that is, that he who owns property must so use it as not to unnecessarily injure others. That neither the defendants in this case, nor any of them, owed the deceased any duty is very evident, the only question ²⁰¹ being, Were they guilty of negligence in leaving the stone in the condition that it was in, so near the public street in the city, under the circumstances in proof, and, if so, were they liable in an action for damages for the death of the deceased occasioned by such negligence? It was not claimed that the plaintiffs were guilty of any negligence in allowing the boy to go upon the street or the lot where he met his death at the time that he received the injury, from the effects of which he, within thirty minutes thereafter, died. The deceased was not traveling along the street at the time of the accident, but had entered upon the lot upon which the house was being builded without invitation, voluntarily, and was at most a mere intruder.

In *Birge v. Gardiner*, 19 Conn. 507, 50 Am. Dec. 261, the defendant, who put a heavy gate on his own land, beside a passway which was used by children going to and from the public road, but left it so carelessly that it fell upon a child between six and seven years of age, who placed his hands upon it and shook it in passing, was held to be liable for the injury.

In *Bransom v. Labrot*, 81 Ky. 638, 50 Am. Rep. 193, defendants had possession and control of an unfenced lot in a city, upon a public street, on which they had stacked a large quantity of lumber in one large and irregular pile, knowing

that children were in the habit of congregating there. The piling of the lumber was so negligently and badly done that as the decedent, an infant, was playing near it, one of the timbers fell upon him and killed him, and it was held, upon demurrer to the petition, that defendants were prima facie liable: See, also, *Earl v. Crouch*, 61 Hun, 624; 16 N. Y. Supp. 770.

So, in *Hydraulic Works Co. v. Orr*, 83 Pa. St. 332, the defendant company was using a building as a factory in which several kinds of business were carried on in different stories, requiring the use of a hoisting ²⁰² apparatus above an inclined plane below for the easy carriage of heavy articles of machinery, etc., into and out of the factory. Children were in the habit of going into the private grounds of defendant, and, with their knowledge, playing under the hoisting apparatus, which came down upon plaintiff's son, six years of age, and injured him so that he died shortly thereafter, and it was held that the negligence of defendants was a question to properly be submitted to a jury.

The cases cited are more favorable to the plaintiff than any others to which our attention has been called, or that we have been able to find. But in all of them the object which caused the injury was a dangerous object left exposed, without guard or attendant, in a place of public or common resort for children, whose natural instincts prompted them to meddle and play with it. These cases seem to reach the limit of liability. Besides, *Hydraulic Works Co. v. Orr*, 83 Pa. St. 332, was subsequently overruled in *Gillespie v. McGowan*, 100 Pa. St. 144, 45 Am. Rep. 365, in which it is held that a child between seven and eight years of age may be a trespasser, and subject to the rules of law relating to trespassers. It is only in case of attractive machinery, or other objects similar in their effect, that children, when injured without fault or negligence on their part, are entitled to recover for personal injuries occasioned thereby, or in case of their death, their legal representatives, and even then such right seems to be predicated of the fact that children are in the habit of resorting to such places for play, with the knowledge of those in charge of such object or machinery: *Railroad Co. v. Stout*, 17 Wall. 657, and cases of like character.

In the case at bar the stone which occasioned the injury had only been placed on the wall about five days at the time the injury occurred, and the evidence did not show that de-

fendants, or any of them, knew of its ³⁰³ dangerous condition, or that children were in the habit of resorting to the building for play, nor can it be said that the construction of the basement of a building like that where the injury occurred, in a large city like St. Louis where so many residences are always in process of construction, has about it anything unusual or unique which would be attractive to children. There is, then, nothing to bring this case within the rule announced in either of the cases hereinbefore referred to.

The son of the plaintiffs, at the time of the accident, was a mere intruder and trespasser upon the lot upon which the house was being built. No inducement or invitation, implied or otherwise, had been held out to him, but, for his own amusement, he was attempting to draw himself up, by placing his hands upon the stone, which, by reason of the pressure thereon, fell upon him and killed him. The defendants owed him no duty, except the negative one not to wantonly or maliciously injure him.

The deceased had left the sidewalk, and stepped over the bounds, and passed the limits to which he was restricted by the street and sidewalk, and, therefore, his case does not come within the rule which requires one person to protect a building upon his own premises, or of which he may be in control which is dangerous to others passing along upon a public street. In 2 Shearman and Redfield on Negligence, fourth edition, page 596, section 715, it is said: "The occupant of land is under no obligation to strangers to place guards around excavations made by him, unless such excavations are so near a public way as to be dangerous, under ordinary circumstances, to persons passing upon the way and using ordinary care to keep upon the proper path, in which case he must take reasonable precautions to prevent injuries to such persons": See, also, *Overholt v. Vieths*, 93 Mo. 422; 3 Am. St. Rep. 557, and authorities cited.

³⁰⁴ So in *Beck v. Carter*, 68 N. Y. 283, 23 Am. Rep. 175, it was held that "where the owner of land expressly, or by implication, invites others to come upon his land, if he permits anything in the nature of a snare to exist thereon, which results in injury to one availing himself of the invitation, and who, at the time, is exercising ordinary care, such owner is answerable for the consequences. If, however, he gives but a bare permission to cross the premises, the licensee takes the risk of accidents in using the premises in the condition

in which they are." But in this case there was no invitation to deceased, nor was there anything from which a license could be inferred to enter upon the lot and building which was under process of construction.

The judgment is affirmed.

All of this division concur.

THE CASE OF *Barney v. Hannibal etc. R. R. Co.*, 126 Mo. 372, was an action by a boy about six years old against a railroad company to recover for an injury to his foot, requiring amputation. The defendant company was the owner of large unfenced railway yards in the city of St. Joseph, Missouri, and in such yards were unoccupied spaces, to which the children in the neighborhood resorted for the purpose of play. They would frequently get on cars as trains moved through the yards or as they were being made up. Sometimes they rode on top of the cars, but most frequently they would catch hold of the stirrup or lower round of the ladder on the side of the cars with their hands, and, placing their feet against the truck of the car, would ride in that way. Plaintiff was a habitue of the yards, and often indulged in the perilous sport of riding on moving cars in the manner above indicated, and, while so riding on one of defendant's freight trains, received the injury complained of. These boys, including the plaintiff, had been in the habit of frequenting the yards, without any license or invitation of any nature from the defendant company. On the contrary, it had instructed its employees to keep them out of the yard, but the men found it impossible to do this and attend to their other duties. Plaintiff recovered a verdict for five thousand dollars, and appealed from an order granting a new trial.

In passing upon the questions presented for review upon appeal the supreme court decided that, "in the first place the rule in what are known as the 'turntable cases' has no application to cases of this sort. Railroad cars and similar machinery are not 'dangerous machines' within the meaning of the rule, as is abundantly and exhaustively shown, both directly and indirectly, in the following cases: *Bishop v. Union R. R. Co.*, 14 R. I. 314; 51 Am. Rep. 386; *Chicago etc. R. R. Co. v. McLaughlin*, 47 Ill. 265; *Gavin v. Chicago*, 97 Ill. 66; 37 Am. Rep. 99; *Catlett v. Railway Co.*, 57 Ark. 461; 38 Am. St. Rep. 254; *Rushenberg v. St. Louis etc. Ry. Co.*, 109 Mo. 112. If a person, no matter what his age, is upon the track or yard of a railroad company without inducement or invitation, express or implied, for him to enter, and he is neither a passenger nor on his way to become one, but is there merely for his amusement and using the track or yard as a playground, he is a mere intruder and trespasser, to whom the railway company owes no duty, except the negative one not maliciously, or with gross or reckless carelessness, to run over or injure him. In case of an accident the company is not liable for injury to one so upon its property, unless it is guilty of gross negligence: *Morrissey v. Eastern R. R. Co.*, 126 Mass. 377; 30 Am. Rep. 686; *Bishop v. Union R. R. Co.*, 14 R. I. 314; 51 Am. Rep. 386; *Hestonville etc. Ry. Co. v. Connell*, 88 Pa. St. 520; 32 Am. Rep. 472; *Snyder v. Hannibal etc. R. R. Co.*, 60 Mo. 413; *Emerson v. Peteler*, 35 Minn. 481; 59 Am. Rep. 337; *McEachern v. Boston etc. R. R. Co.*, 150 Mass. 515; *Kay v. Pennsylvania R. R. Co.*, 65 Pa. St. 269; 3 Am. Rep. 628; *Central etc. R. R. Co. v.*

Henigh, 23 Kan. 347; 33 Am. Rep. 167; *Curley v. Missouri etc. Ry. Co.*, 98 Mo. 13; *Chicago etc. R. R. Co. v. Stumps*, 69 Ill. 409.

"It is claimed that it was the duty of the defendant company to fence its yards. While cases may be found requiring the performance of such a duty when it is imposed by special statutory provision, yet no case has been encountered where, in the absence of such statutory provision, it has been adjudicated that the duty of fencing exists, because the common law recognizes no such obligation. And railroad corporations stand, in this regard, on the same footing as individuals: *Illinois etc. R. R. Co. v. Carraher*, 47 Ill. 333; *Hughes v. Hannibal etc. R. R. Co.*, 66 Mo. 325; *Hayes v. Michigan etc. R. R. Co.*, 111 U. S. 228.

"If a railroad car or train is not to be regarded as a dangerous machine, as has been decided, then no necessity exists to place a barrier to prevent trespassers on the private yards of a railroad company from being injured. To such trespassers, no matter what their age, the railroad company, not having invited or encouraged their coming, owes no duty, except that of not wantonly or recklessly injuring them after having discovered them to be in peril: *Williams v. Kansas City etc. Ry. Co.*, 96 Mo. 283; *Cauley v. Cincinnati etc. Ry. Co.*, 95 Pa. St. 398; 40 Am. Rep. 664."

Even as to a licensee, the rule is that "no duty is imposed by law upon the owner or occupant to keep his premises in a suitable condition for those who come there solely for their own convenience or pleasure, and who are not either expressly invited to enter or induced to come upon them by the purposes for which the premises are appropriated and occupied, or by some preparation or adaptation of the place for use by customers or passengers, which might naturally and reasonably lead them to suppose that they might properly and safely enter: *Straub v. Soderer*, 53 Mo. 43."

In short, mere passive acquiescence of the occupier in a certain use of his land by others generates no liability on his part: *Moore v. Wabash etc. Ry. Co.*, 84 Mo. 485.

And the same principle which, under the authorities cited, would deny the necessity for guards to keep trespassing children from boarding moving cars would equally reject the necessity of barriers when demanded in place of such guards. There are cases where fences are needed and where liability arises, where injury occurs in consequence of their not being built, but that is only where, as for instance, the owner's premises extend up to the public highway and a dangerous excavation exists in close proximity to such thoroughfare.

"If it be true, as shown by the authorities, that plaintiff was a trespasser to whom defendant owed no duty except that of not wantonly or recklessly injuring him, after discovering his peril, then, of course, no duty existed outside of that exception between the defendant corporation and the plaintiff, and if no duty, then no negligence, because the latter must have the former as its inevitable and indispensable predicate: *Hallihan v. Railroad*, 71 Mo. 113.

"But plaintiff, in the particular act which resulted in the accident, was a trespasser, made so by the statute as well as by the ordinance of St. Joseph. Section 3927 of the Revised Statutes of 1889 makes it a misdemeanor for 'any person, minor, or adult to climb upon, hold to, or in any manner attach himself to any locomotive engine or car, while the same is in motion, or running into or through any city or town in this state.' The ordinance is of similar import.

"Plaintiff being a trespasser, a violator of law, could have no ground

of recovery based on his own dereliction. But it is claimed for plaintiff that these regulations of the law do not apply to 'babies.' While the law may not apply in a criminal proceeding to a child of very tender years, yet still, for the purposes of a civil action, the consequences of the unlawful act must be the same in the case of an infant even of very tender years as in the case of an adult. In a word, the act of the infant in consequence of his tender years, though noncriminal, yet is wrongful in the sense of being an invasion of the rights of another, just as much so as though done by an adult. And a landowner is under no duty to a mere trespasser to keep his premises safe; and the fact that the trespasser is an infant does not raise a duty where none otherwise exists: *Frost v. Railroad*, 64 N. H. 220; 10 Am. St. Rep. 396, and cases cited.

"But plaintiff's counsel says that defendant assumed the duty of keeping its yards clear of boys by giving instructions to its yard hands; but that this duty was neglected, and therefore a cause of action arises alone from this neglect. But if the prior duty did not exist to keep the boys out of the yards, then the mere assumption of a nonexistent duty would be but a gratuity, with no precedent or concurrent consideration on which to base it, and therefore no liability would follow such assumed and pretermitted duty. Mere pretermittance of a self-imposed precaution does not constitute actionable negligence: *Skelton v. Railroad*, L. R. 2 Q. B. 636; Campbell on Negligence, 2d ed., sec. 41."

REAL PROPERTY—LANDOWNER'S LIABILITY TO TRESPASSING CHILDREN. The owner of land is not required to provide against remote and improbable injuries to children trespassing thereon, but he is liable for injuries to children trespassing upon his private grounds if it is known to him that they are accustomed to go upon such grounds, and that from the peculiar nature and exposed condition of something thereon it is attractive to children, and he ought reasonably to anticipate such an injury to a child as that which in fact occurred: *Brinkley Car Co. v. Cooper*, 60 Ark. 545; 46 Am. St. Rep. 216, and note.

JOHNSON-BRINKMAN COMMISSION COMPANY v. MISSOURI PACIFIC RAILWAY COMPANY.

[126 MISSOURI, 844.]

ELECTION—INCONSISTENT REMEDIES.—One who having a right to pursue one of two inconsistent remedies makes his election, institutes suit, and prosecutes it to final judgment, or receives anything of value under the claim thus asserted, is estopped to thereafter pursue another and inconsistent remedy.

ELECTION—ESTOPPEL—INCONSISTENT REMEDIES.—An attachment suit brought by a vendor of personal property against his vendee, if dismissed before final judgment, does not estop him from subsequently maintaining an action of replevin to recover the chattels in the absence of any intervening rights, injury, or change of position of the parties by reason of the attachment.

ELECTION—INCONSISTENT REMEDIES.—A creditor having simply elected to pursue one of two inconsistent remedies is not bound thereby, but may subsequently dismiss and abandon before final judgment the one first chosen, and then pursue the other in the absence of intervening rights, injury, or benefit.

Lathrop, Morrow & Fox, for the appellant.

E. Robinson and J. S. Laurie, for the respondent.

³⁴⁵ BURGESS, J. This is an action of replevin for three carloads of wheat. On a trial before a jury, in the circuit court of Jackson county, there was a demurrer interposed by defendant to the evidence, which was ³⁴⁶ sustained, final judgment rendered for defendant against plaintiff for the value of the wheat at the time of the trial, which was fixed at twelve hundred and thirty-seven dollars and thirty-four cents, and ninety-two dollars and eighty cents for damages for its wrongful taking and detention. From the judgment plaintiff appealed to the Kansas City court of appeals, where the judgment was affirmed, but that court certified the cause to this court because of the opinion of that court being in conflict with the opinion of the St. Louis court of appeals in *Anchor Milling Co. v. Walsh*, 20 Mo. App. 107, and *Lapp v. Ryan*, 23 Mo. App. 436.

On September 1, 1890, the Imboden Commission Company was a corporation engaged in the grain business at Kansas City, Missouri. In the latter part of August of that year the plaintiff sold and delivered to the Imboden company a number of cars of wheat, among which were included the three cars here in controversy, which were then in the freight-yard of the defendant company at that city. The sale was for cash on delivery. According to the custom which prevailed among grain dealers in Kansas City, the plaintiff furnished to the Imboden company elevator receipts, certificates of weight, inspection certificate as to grade, invoices, and bills of lading, the bill of lading being issued by the defendant company. Immediately upon the receipt of said bill of lading Imboden surrendered it to the defendant company, and obtained from said defendant company in lieu thereof another bill of lading for said wheat whereby the wheat was to be delivered upon the order of the Imboden company to C. H. Albers & Company at St. Louis.

As soon as Imboden received the bill of lading, he took it to the Central Bank in Kansas City, and indorsed and delivered it to said bank with a draft thereto attached upon Albers & Company for thirteen hundred and eighty-three dollars and sixty-two cents, which was signed by the Imboden company, and made ³⁴⁷ payable to said bank. During the afternoon of the same day the Imboden Commission Com-

pany sent its check drawn on the Central Bank for thirteen hundred and seventy-four dollars and eighty-two cents, the contract price for the wheat to the Johnson-Brinkman Commission Company. The Imboden company kept its account with the Central Bank, and on September 1st its account was overdrawn several thousand dollars.

In the afternoon of September 1st plaintiff, becoming apprehensive that the check it had received from the Imboden Commission Company was likely to be dishonored, Johnson, in company with Imboden, went to the Central Bank, presented the check, and demanded its payment or a surrender of the Albers draft and bill of lading, but the bank declined to do either one. Johnson and Imboden then went to the latter's office, and, at Johnson's request, Imboden turned over to him for the Johnson-Brinkman Commission Company all its office furniture to protect it on account of the sale of its wheat, Johnson taking possession of the office and putting a notice on the door. They then went to the telegraph office, and, at Johnson's request, Imboden telegraphed Albers & Company to pay no more drafts. Johnson also immediately thereafter notified the superintendent of defendant's freight-yard at Kansas City to hold the wheat until further orders from the Johnson-Brinkman Commission Company.

During the same evening Johnson went to the office of his attorneys, and, after a short conference with them, sued out an attachment in the name of the Johnson-Brinkman Commission Company as plaintiff and against the Imboden Commission Company as defendant. The petition alleged the sale and delivery of the wheat, and the affidavit for attachment averred that the sale was for cash on delivery, and that the Imboden Commission Company had failed to pay for the same. ²⁴⁸ A writ of attachment was then issued by the proper officer, and the wheat seized by the sheriff.

On September 9, 1890, plaintiff dismissed the attachment suit, and afterward, on the same day, began the present action to recover possession of said wheat, and the same was delivered to it in pursuance of an order of delivery issued herein.

On September 1st the Central Bank sent the bill of lading and draft upon Albers & Company to its correspondent in St. Louis for collection. On the following day it was presented for payment; but Albers, having in the meantime been notified by Imboden to pay no more drafts, declined to pay it at that time, but subsequently paid it at the request of the Cen-

tral Bank. This was after the cashier of the Central Bank had gone to St. Louis and assured Albers that Imboden had no interest in the wheat; that the bank was the owner thereof, and that he, Albers, should receive the wheat if paid for. It was after this assurance, and relying thereupon, that Albers, without any knowledge, as claimed by him, of the claim of Johnson-Brinkman Commission Company, paid the draft.

Plaintiff's first contention is that the court erred in ruling, as a matter of law, that the mere act of plaintiff in bringing an attachment suit against the Imboden Commission Company and attaching the wheat as its property, and subsequently dismissing it before final judgment, and the commencement of this action, was a conclusive election between inconsistent remedies and a complete bar to this action.

Upon this question there is a direct conflict in the opinion rendered in the case by the Kansas City court of appeals: (*Johnson-Brinkman etc. Co. v. Missouri Pac. Ry. Co.*, 52 Mo. App. 407), and the decisions of the St. Louis court of appeals in *Anchor Milling Co. v. Walsh*, 20 Mo. App. 107, and *Lapp v. Ryan*, 23 Mo. App. 436. It was held by the Kansas City court of ³⁴⁹ appeals in this case that, as the plaintiff had an election between inconsistent remedies, as where one action is founded on an affirmation of a voidable sale or contract, any decisive act of affirmation or disaffirmance, if done with knowledge of the facts, determines the legal rights of the parties once for all; and that the institution of the attachment suit by plaintiff against the Imboden Commission Company was such a decisive act, and a bar to this suit, while in *Anchor Milling Co. v. Walsh*, 20 Mo. App. 107, it was held that the levy of an attachment upon chattels as the defendant's property does not prevent the plaintiff from subsequently seizing the same property in replevin as his own. This case was followed and approved by the same court in *Lapp v. Ryan*, 23 Mo. App. 436. Both of the cases last named were followed and approved by this court in *Johnson-Brinkman etc. Co. v. Central Bank*, 116 Mo. 558; 38 Am. St. Rep. 615.

But it is insisted by counsel for defendant that the three cases last named are not in accord with the great weight of authority, which is, as he claims, as announced in this case (*Johnson-Brinkman etc. Co. v. Missouri Pac. Ry. Co.*, 52 Mo. App. 407), and should be modified or overruled. It is well-settled law that where a party has the right to pursue one of

two inconsistent remedies, and he makes his election and institutes his suit, in case the action thus begun is prosecuted to final judgment, or the plaintiff has received anything of value under a claim thus asserted, he cannot thereafter pursue another and inconsistent remedy: *Nanson v. Jacob*, 93 Mo. 331; 3 Am. St. Rep. 531; *Estes v. Reynolds*, 75 Mo. 563; *Stoller v. Coates*, 88 Mo. 514; *Bradley v. Brigham*, 149 Mass. 141; *Farwell v. Myers*, 59 Mich. 179; *Ewing v. Cook*, 85 Tenn. 332; 4 Am. St. Rep. 765; *Bank of Beloit v. Beale*, 34 N. Y. 473; *Fields v. Bland*, 81 N. Y. 239; *Boots v. Ferguson*, 46 Hun, 129; *Carter v. Smith*, 23 Wis. 497; *Wheeler v. Dunn*, 13 Col. 428; *Thomas v. Joslin*, 36 Minn. 1; 1 Am. St. Rep. 624; *Fowler v. Bowery Sav. Bank*, 113 N. Y. 450; 10 Am. St. Rep. 479.

250 There is also another class of decisions which holds that a creditor having simply elected to pursue one of two inconsistent remedies is bound thereby, and that he cannot subsequently abandon the one first chosen and pursue the other. Thus it is held in *O'Donald v. Constant*, 82 Ind. 212, that, "While a creditor of whom the debtor had bought goods, not intending to pay for them, but to use them in preferring other creditors, may doubtless disaffirm the sale, and recover his goods, unless resold to an innocent purchaser, yet, by bringing an attachment suit against his debtor, he affirms the sale and takes the place of an ordinary creditor": See, also, *Lehman v. Van Winkle*, 92 Ala. 443; *Morris v. Rexford*, 18 N. Y. 552; *Moller v. Tuska*, 87 N. Y. 166; *Nield v. Burton*, 49 Mich. 53; *Bauman v. Jaffray*, 6 Tex. Civ. App. 489; *Crompton v. Beach*, 62 Conn. 25; 36 Am. St. Rep. 323.

The authorities, however, upon this proposition are not quite uniform. Thus, in *Equitable Foundry Co. v. Hersee*, 33 Hun, 169, it was held that when the plaintiff had instituted a suit in affirmance of the contract, but had dismissed the same before judgment, and before having derived any benefit therefrom, and which had inflicted no injury upon the defendant, such action did not constitute an absolute election of inconsistent remedies whereby plaintiff was afterward precluded from prosecuting a new suit upon another and inconsistent remedy.

So in *Johnson v. Frew*, 33 Hun, 193, plaintiff sued defendant to recover possession of a harness which one Galitz fraudulently induced the plaintiff to sell and deliver to him on credit. Plaintiff afterward took the harness from de-

defendant's possession and carried it away, but before doing so he procured an attachment from a justice of the peace upon an affidavit alleging, among other things, that Galitz was indebted to him for the unpaid portion of the purchase price of the harness, which ³⁵¹ attachment Quaint, the constable, had with him when the harness was taken from the depot where defendant had left it. Smith, P. J., in speaking for the court said: "It is contended by the appellant's counsel that the plaintiff, by his attachment proceeding, elected to affirm the contract. That would be the case if the attachment was issued in an action which had been prosecuted to judgment or was pending at the time of the trial. But of that there is no proof. . . . It was not, therefore, conclusive against the plaintiff as matter of law. At most, the plaintiff's affidavit and his proceedings under the attachment, even if he be assumed to take the harness by virtue of it, raised a question of fact as to whether he affirmed the contract."

In an action to recover damages for the fraud of defendant in obtaining certain goods from the plaintiffs under a contract induced by the false and fraudulent representations of the defendant, a writ of attachment was issued and levied upon a portion of the goods alleged to have been so obtained, together with other goods of the defendant; and it was held that such levy, and a sale thereunder, did not necessarily constitute a waiver of the fraud and an affirmance of the contract by the plaintiff: *Dean v. Yates*, 22 Ohio St. 388; see, also, *Peters v. Ballistier*, 3 Pick. 495.

But the authorities which hold that, when an election of remedies has been made which are inconsistent, in order to amount to an estoppel it must be made with full knowledge of all the facts in the case: *Black v. Miller*, 75 Mich. 323; *Bulkley v. Morgan*, 46 Conn. 393; *Connihan v. Thompson*, 111 Mass. 270; *Terry v. Munger*, 121 N. Y. 161; 18 Am. St. Rep. 803; *Conrow v. Little*, 115 N. Y. 387; *Equitable etc. Foundry Co. v. Hersee*, 103 N. Y. 25; *Thompson v. Howard*, 31 Mich. 309; *O'Bryan v. Glenn*, 91 Tenn. 106; 30 Am. St. Rep. 862. It has also been said that "the mere fact that a party mistakes his remedy, ³⁵² believing he has two or more remedies when he has not, and pursues the wrong one, will not of itself prevent him from subsequently obtaining redress by the proper remedy": 1 Elliott's General Practice, sec. 276. In *Snow v. Alley*, 156 Mass. 193, it is said: "Election exists

when a party has two alternative and inconsistent rights, and it is determined by a manifestation of choice: *Metcalf v. Williams*, 144 Mass. 452, 454. But the fact that a party wrongly supposes that he has two such rights, and attempts to choose the one to which he is not entitled, is not enough to prevent his exercising the other if he is entitled to that. There would be no sense or principle in such a rule."

The question then arises, How was it, or by whom was it, to be determined that the plaintiff herein mistook his remedy in bringing the attachment suit? It will not be contended, we presume, that after it had been instituted, and although plaintiff's attorney had become fully satisfied that the action had been improvidently brought, yet that it was necessary in order to save to his client the right to sue in replevin, that he should at his expense prosecute the case to final judgment, in order to settle that question. Nor do we for one moment suppose that that issue could be tried in this controversy. It necessarily follows that plaintiff must have determined for himself upon the advice of his attorney, just as he did do, whether he would proceed with the attachment suit to final judgment or not, and having determined to dismiss it, that he was not, by reason of having instituted it, estopped from bringing this action. We are aware that it was otherwise held in *O'Bryan v. Glenn*, 91 Tenn. 106, 30 Am. St. Rep. 862, but that case seems to be so inconsistent with reason and justice that we must decline to give it our approval.

353 The authorities which hold that a person having two inconsistent remedies, and electing to pursue one, cannot thereafter pursue the other, do so upon the ground of election, or, as most courts put it, estoppel. As was said in *Anchor Milling Co. v. Walsh*, 20 Mo. App. 106: "There is no element of estoppel in the case. There is no estoppel by record, for the attachment suit has not proceeded to judgment. There is no estoppel in pais, for the defendant has not taken such action in consequence of the suing out of the attachment that he will receive detriment in a legal sense from the conduct of the plaintiff in changing his position and pursuing a different remedy."

There were no intervening rights in this case from the time of suing out the attachment until that suit was dismissed, nor is it claimed that the defendant therein was by reason thereof induced to change his position with respect of the wheat in controversy. "Estoppel in pais may be defined to

be a right arising from acts, admissions, or conduct which have induced a change of position in accordance with the real or apparent intention of the party against whom they are alleged": Bigelow on Estoppel, 4th ed., 445.

The attachment suit was brought hastily and without time, as appears from the record, for the attorneys who brought it to investigate the facts in the case, who after having done so came to the conclusion that it was improvidently brought, and dismissed it; and to hold, under such circumstances, that plaintiff is estopped by his election in that case from prosecuting this, in the absence of intervening rights, injury, or change of position by anybody, by reason thereof, would be, we think, invoking a harsh and very unjust rule.

But, aside from any misconception as to the institution of the attachment suit, as it was dismissed ³⁵⁴ before judgment, before the rights of others had intervened, and as the defendant therein was in no way injured in consequence thereof, we are not inclined to hold that plaintiff is, by reason of the institution of that suit, estopped from prosecuting this: *Anchor Milling Co. v. Walsh*, 20 Mo. App. 107; *Lapp v. Ryan*, 23 Mo. App. 436; *Johnson-Brinkman Co. v. Central Bank*, 116 Mo. 558; 38 Am. St. Rep. 615.

It is insisted by counsel for defendant that the judgment was for the right party and should for that reason be affirmed. While it may be conceded that plaintiff's right to rescind the sale of the wheat was subject to any rights that may have accrued in favor of third parties during the interval between the sale and the time that it was replevied, yet as to whether Albers & Company, in good faith, and without notice, paid the draft drawn on them by the Imboden Commission Company, which was attached to the bill of lading accompanying the wheat, was a question to be passed upon by the jury, under the evidence, and there was some evidence which tended to show that they paid the draft with notice of plaintiff's claim to the wheat, and upon the assurance of the Central Bank that if they paid the draft they should have the wheat.

The judgment of the court of appeals is reversed, with directions to reverse the judgment of the circuit court, and to remand the cause, to be tried in conformity with the views herein expressed.

All of this division concur.

ELECTION BETWEEN INCONSISTENT REMEDIES—ESTOPPEL.—Where one has a choice between two inconsistent rights or remedies, and deliberately makes his choice, such election becomes conclusive upon him and precludes him from subsequently pursuing the other right or remedy: *Crook v. First Nat. Bank*, 83 Wis. 31; 35 Am. St. Rep. 17, and note. An election of a remedy once fairly made by a party having the right to make it is final and irrevocable: *Moline Plow Co. v. Rodgers*, 53 Kan. 743; 42 Am. St. Rep. 317. See, further, the extended notes to *Fowler v. Bowery Sav. Bank*, 10 Am. St. Rep. 487; and *Thomas v. Joslin*, 1 Am. St. Rep. 626.

ESTOPPEL—ELECTION OF REMEDIES.—On a sale of goods for cash and a failure of payment, the vendor, by bringing an action by attachment against the purchaser to recover the purchase price, is not estopped from dismissing that action before judgment, and then maintaining an action for the conversion of the goods: *Johnson-Brinkman etc. Co. v. Central Bank*, 116 Mo. 558; 38 Am. St. Rep. 615, and note.

CASES
IN THE
SUPREME COURT
OF
NEBRASKA.

SMILEY v. MACDONALD.

[42 NEBRASKA, 5.]

CONSTITUTIONAL LAW—EXCLUSIVE FRANCHISE BY MUNICIPALITY.—A constitutional provision prohibiting the legislature from granting “any special or exclusive privileges, immunity, or franchise whatever,” is not a restriction upon the power of the legislature over the subject involved, but is a limitation upon the manner of exercising such power, and does not prohibit a city of the metropolitan class from contracting for the removal therefrom of dead animals, garbage, and other noxious and unwholesome matter, though the privilege thereby conferred upon the contractor is exclusive.

POLICE POWER—RESTRICTION UPON REGULATIONS.—The legislature cannot, under the guise of police regulations, arbitrarily invade personal rights and private property, but it should appear to the court, when such regulations are called in question, that they have, in fact, some relation to the public health or public welfare, and that such is the end sought to be attained thereby.

Saunders, Macfarland & Dickey, for the appellant.

Breckenridge & Breckenridge, for the appellee.

• **POST, J.** This is an appeal from a decree of the district court for Douglas county, restraining the defendant from proceeding under a contract with the city of Omaha providing for the removal of the garbage, offal, dead animals, etc., from said city. In view of the importance of the question at issue it is deemed proper to copy at length from the petition, to wit:

“The plaintiff states to the court that he is a citizen and resident of the city of Omaha, Nebraska, and a taxpayer therein, and has been such resident of the city of Omaha and

a taxpayer therein for, to wit, the period of eight years, and he brings this action in said capacity, as a taxpayer and citizen of said city, against this defendant, Alexander MacDonald, and states to the court the following facts:

“That on the 21st day of July, 1893, said Alexander MacDonald, the defendant herein, made and entered into a pretended contract or agreement with the city of Omaha, under and by the terms of which, for a period of ten years from and after January 1, 1894, said Alexander MacDonald, in consideration of being allowed the right to remove dead animals, garbage, offal, night soil, etc., within the city of Omaha, for the period of ten years from and after January 1, 1894, under the terms and stipulations contained in said pretended contract, a copy of which is hereto attached, marked ‘Exhibit A,’ and made a part hereof as though incorporated at length in the body of this petition, agreed to pay the said city of Omaha, annually, for such privilege, at the end of each year, during the existence of said contract, the sum of \$250.

“Plaintiff alleges that under and by virtue of the terms of said pretended contract the defendant is given an exclusive privilege and right, which is illegal and contrary to law, and is permitted thereunder to make large profits in the transaction of the business therein specified, and that the compensation fixed by said contract or agreement is burdensome upon the taxpayers of said city, and is in excess of the reasonable value of the services to be so rendered.

“The plaintiff further says that the contract as aforesaid is unlawful in this, to wit, that the privilege of removing garbage, dead animals, offal, night soil, etc., necessary to be removed, under the requirements of the board of health, as set out in said pretended contract or agreement with said city and the defendant, is a franchise, and that no authority to grant said franchise to said defendant Alexander MacDonald was ever voted by the citizens and legal voters within and for said city of Omaha, Nebraska, and that the city council and the municipal authorities of said city of Omaha had no right or authority whatever to make and enter into any such contract.

“Plaintiff says that he is informed and believes that the said defendant is about to enter upon the execution of his said pretended contract with the said city, and if permitted to do so will, under color of authority as shown by said pretended contract, levy and assess upon said taxpayers of the

city of Omaha and this plaintiff unlawful dues for the removal of garbage, dead animals, offal, night soil, etc.

"Plaintiff alleges that he is without remedy at law.

"Wherefore plaintiff prays that said pretended contract between the said city of Omaha and said Alexander MacDonald be declared null and void and set at naught, and that the defendant, his agents, employees, and servants, be perpetually enjoined from proceeding under said pretended contract to remove dead animals, garbage, offal, night soil, etc., or any other filth required to be removed by board of health or the ordinances of said city of Omaha, and for such other relief as to the court may seem meet."

The contract to which reference is therein made is as follows:

10 "This agreement, made and entered into this 21st day of July, 1893, by and between the city of Omaha, party of the first part, and Alexander MacDonald, party of the second part,

"Witnesseth: That the party of the second part, in consideration of being allowed to remove and make use of all the dead animals, garbage, offal, night soil, etc., necessary to be removed, as may be required by the board of health or ordinances of said city of Omaha, during the period of ten years commencing January 1, 1894, or from such time prior to said date as may be required by the mayor and council, hereby agrees, in accordance with the ordinances of said city now existing or hereafter passed, and in accordance with the rules and regulations of the board of health of said city, and as may be required by the commissioner of health upon payment of the charges herein authorized, to remove to some place or places at least two and one-half miles outside of the corporate limits of said city, and if within three miles of the corporate limits of said city to such place or places as may be designated by said board of health, and dispose of the same in such manner as not to cause or create a nuisance, all dead animals, garbage, manure, ashes, filth, offal, night soil, etc., as may now or hereafter during the existence of this contract be required to be removed by said ordinances, rules, or regulations at not exceeding the prices following, to wit:

"Each dead animal weighing over 500 pounds, \$2.00.

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"Whenever the owner of any dead animals found in the public streets or at any public place is unknown, the said

party of the first part agrees to pay to said party of the second part the sum above specified for removing such animals upon satisfactory proof being furnished of the removal of any such animals and that the owner thereof is unknown.

"It is further understood and expressly agreed that for ¹¹ the privileges herein granted the party of the second part shall annually pay to the said party of the first part at the end of each year the sum of two hundred and fifty (\$250) dollars.

"It is further understood and expressly agreed by said party of the second part that at all times during the existence of this contract he shall be subject to the orders of said board of health and to the ordinances of said city, and that he will promptly and faithfully comply with the same.

"It is further understood and agreed that said party of the second part, for the purpose of removing said dead animals, garbage, manure, ashes, filth, offal, night soil, etc., shall be permitted to load the same upon cars at five places as near equally distant from each other as is practicable, such places for loading cars to be approved by the board of health of said city, and to be subject to change from time to time as said board of health may require."

To the foregoing petition a general demurrer was interposed, which was overruled, and the defendant refusing to plead further, a decree was allowed as prayed, and which is the decree involved in this appeal.

The issue involved is thus tersely stated by counsel for plaintiff: "There is one question only presented by the demurrer, and that is whether the contract is an exclusive franchise." The plaintiff has assumed the affirmative of that position, and asserts that said contract is in contemplation of law a franchise, and therefore within the prohibition contained in section 15 of article 3 of the constitution. The provision of said section which is invoked in this action is as follows: "The legislature shall not pass local or special laws in any of the following cases, that is to say: Granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever. In all other cases where a general law can be made applicable, no special law shall be enacted." ¹² From a careful analysis of that provision it would seem that it was intended, not as a restriction upon the power of the legislature over the subject involved, but rather as a limitation in respect to the

manner of the exercise of that power. The precise limitation of the legislative power to confer by general law privileges in their nature exclusive is foreign to our present inquiry. It is sufficient for the purpose of this controversy that, according to recognized rules of construction, the people of the state must be understood to have conferred upon the legislature all of the sovereign power resting in them, subject only to the limitations of the state and national constitutions, for, as said by Judge Redfield in *Thorpe v. Rutland etc. R. R. Co.*, 27 Vt. 140, 72 Am. Dec. 625, the American legislatures have the same unlimited power, except when restrained by written constitutions, as the British parliament. We might safely rest our conclusion upon the reasons stated, but there are other considerations suggested by the record which it is deemed proper to notice.

It will be observed that no claim is made to the effect that the contract complained of is unauthorized by the ordinances of the city of Omaha. The inference, therefore, is that it was executed in pursuance of an ordinance having at least the form of law. The question is thus presented whether the contracting for the removal of the garbage, offal, and other unwholesome substances by contract for a term of years is an assumption of power by the city in excess of that conferred by chapter 12a of the Compiled Statutes, entitled "Metropolitan Cities," and which, for convenience, will be referred to as its "charter." By section 23 thereof it is provided that "the mayor and council shall have power to make and enforce all police regulations for the good government, general welfare, health, safety, and security of the city and the citizens thereof, in addition to the police powers expressly granted herein, and in the exercise of the police power may pass all needful¹⁸ and proper ordinances," etc. By section 27 it is provided that "the mayor and council shall have power to prevent any person or persons from bringing, depositing, having, or leaving upon or near his premises or elsewhere within the city any putrid or diseased carcass, or any putrid, diseased, or unsound beef, pork, poultry, fish, hides, or skins of any kind, or any other unwholesome substance, and to compel the removal of the same at the expense of such person or persons." It requires no argument to prove that the subject of the contract before us is within the strict letter of these provisions of the charter. The boundary line which divides the police power of the state from the other functions of govern-

ment is often difficult to discern. As said by Shaw, C. J., in *Commonwealth v. Alger*, 7 Cush. 85: "It is much easier to perceive and realize the existence and sources of this power, than to mark its boundaries, or prescribe limits to its exercise." It may, however, with safety be asserted that the legislature cannot, under the guise of police regulations, arbitrarily invade personal rights and private property. On the other hand, it should appear to the court, when such regulations are called in question, that they have, in fact, some relation to the public health or public welfare, and that such is the end sought to be attained thereby (*In re Jacob*, 98 N. Y. 98; 50 Am. Rep. 636; *Millett v. People*, 117 Ill. 303; 57 Am. Rep. 869); but the removal of the noxious and unwholesome matter mentioned in the contract tends directly to promote the public health, comfort, and welfare, and is, therefore, a proper exercise of the police power. Nor is the fact that in this instance the city has by contract conferred an exclusive privilege material. From the power thus conferred upon the city is implied the duty to determine the means and agencies best adapted to the end in view. The means adopted appear to be not only a reasonable and necessary regulation, but a judicious exercise of the discretion conferred upon the city. That the object of all such regulations can be best attained by intrusting the ¹⁴ work in hand to a responsible contractor who possesses the facilities for carrying it on with dispatch and with the least possible inconvenience to the public is apparent to all. In the case of *Vandine, Petitioner*, 6 Pick. 187, 17 Am. Dec. 351, Putnam, J., referring to a similar regulation of the city of Boston, said: "It seems to us, however, that the city authorities have judged well in the matter. They prefer to employ men over whom they have an entire control by night and by day, whose services may be always had, and who will be able from habit to do this work in the best possible way and time. Practically, we think the main object of city government will be better accomplished by the arrangement adopted, than by relying upon the labor of others against whom the government would have no other remedy than by a suit for breach of contract. . . . We are satisfied that the law is reasonable, and not only within the power of the government to prescribe, but well adapted to preserve the health of the city": See, also, *River Rendering Co. v. Behr*, 7 Mo. App. 345; *Walker v. Jameson* [Ind., May 9, 1894], 37 N. E.

Rep. 402; Tiedeman on Limitations of Police Power, 316; and also, as applicable in principle, *Boehm v. City of Baltimore*, 61 Md. 259; *State v. Lowery*, 49 N. J. L. 391; *People v. Gordon*, 81 Mich. 306; 21 Am. St. Rep. 524; *Kilvington v. City of Superior*, 83 Wis. 222. The alleged excess of power is a mere sanitary measure, as obviously so as the familiar and necessary quarantine for the detention of persons exposed to contagious diseases. In either case, the privilege, although exclusive, is but an incident to the proper exercise of the general police power of the state. The judgment of the district court is therefore reversed and the cause remanded for further proceedings therein.

Reversed.

CONSTITUTIONALITY OF SPECIAL OR LOCAL STATUTES.—It is no objection to a statute that it is special or local, “if all persons subject to it are treated alike under similar circumstances and conditions in respect both to the privileges conferred and the liabilities imposed”: See monographic note to *State v. Goodwill*, 25 Am. St. Rep. 884, on the fourteenth amendment considered with relation to special privileges, burdens, and restrictions.

POLICE POWER.—Although the police power primarily inheres in the state, the legislature may delegate a large measure of it to municipal corporations; and the power thus delegated may be conferred in express terms, or it may be inferred from the mere fact of the creation of the corporation: *City of Crawfordsville v. Braden*, 130 Ind. 149; 30 Am. St. Rep. 214; *Syare Borough v. Phillips*, 148 Pa. St. 482; 33 Am. St. Rep. 842, and note, showing that pursuant to the authority delegated to it a municipal corporation may pass ordinances having the same force within the corporate limits as a statute passed by the legislature. While the legislature has a wide discretion in the exercise of its police power, it is not the exclusive judge of what is needful or proper, and it is always a judicial question whether any particular regulation of the right is a valid exercise of the power: *Ex parte Whitwell*, 98 Cal. 73; 35 Am. St. Rep. 152; *Health Department v. Rector*, 145 N. Y. 32; 45 Am. St. Rep. 579. The police power has limitations, and cannot be arbitrarily exercised so as to deprive the citizen of his liberty or property: See monographic note to *State v. Goodwill*, 25 Am. St. Rep. 880; *Health Department v. Rector*, 145 N. Y. 32; 45 Am. St. Rep. 579; monographic note to *Butler v. Chambers*, 1 Am. St. Rep. 645, on power of the state to regulate or prohibit the sale or manufacture of articles.

HOOK v. BOWMAN.

[42 NEBRASKA, 80.]

VENDOR AND PURCHASER—RIGHT OF PURCHASER TO RELY UPON VENDOR'S REPRESENTATIONS.—A purchaser of real estate has a right to believe and rely upon representations made to him by his vendor as to the character, quality, and location of the property when the facts concerning which the representations are made are unknown to the vendee, although they are a matter of public record.

RIGHT OF ONE PARTY TO CONTRACT TO RELY UPON REPRESENTATIONS MADE BY THE OTHER—NEGLIGENCE.—An omission by one of the parties to an agreement to make inquiries as to the truth of facts stated by the other cannot be imputed to him as negligence. Every contracting party has an absolute right to rely on the express statement of an existing fact, the truth of which is known to the opposite party and unknown to him, as the basis of a mutual agreement.

VENDOR AND PURCHASER—MISREPRESENTATION—LACHES.—If a vendor of real estate makes material representations as to the character, quality, or location of his land, and the vendee believes, relies, and acts on such representations, which prove to be false, the vendor cannot shield himself from the consequences of his fraudulent conduct by interposing the plea of laches on the part of his vendee.

VENDOR AND PURCHASER—RESCISSION OF CONTRACT OF SALE FOR MISREPRESENTATION—ILLUSTRATION.—If one wishing to buy two lots in a city addition for building purposes is shown corners and stakes by the owner's agent, who represents that one is a corner lot, which is false, that the other is contiguous thereto, and that both front on a certain street, but the streets have not been opened through the addition, and the prospective purchaser, believing and relying on the truth of such representations, enters into a written contract with the owner, agreeing to purchase and to pay for the lots, such representations, under the circumstances, are material, and entitle the former to a rescission of the contract.

G. A. Rutherford, for the appellant.

George M. O'Brien and Moses P. O'Brien, for the appellee.

⁸¹ RAGAN, C. On the twenty-fourth day of June, 1887, Agnes B. Hook, by her contract in writing of that date, agreed to sell and convey to Anna K. Bowman lots 1 and 2, in Hook's subdivision of lots 15 and 16, in Brookline, Douglas county, Nebraska. At the time of the making and delivery of the contract Mrs. Bowman paid one hundred dollars of the purchase money, the contract providing that the remainder should be paid in three equal annual installments; and when such payments were made Mrs. Hook was to execute to Mrs. Bowman a deed of conveyance for the property mentioned in the contract. Default in the payments having occurred, Mrs. Hook brought this suit to the district court

of Douglas county against Mrs. Bowman for an accounting of the amount due her from Mrs. Bowman on the contract, and for a decree ordering the property sold to pay the amount found due. Mrs. Bowman, as a defense to this action, pleaded that prior to the execution of the contract sued upon the plaintiff represented to her that said lot 1 was a corner lot, bounded on the north by Park street and on the east by Sawyer street, and that lot 2 was contiguous to lot 1, and both fronted on Sawyer street; that she, Mrs. Bowman, relied upon these representations and believed the same to be true; and, in consequence of the statements and ⁸² her belief in their truth, she entered into the contract sued upon, agreeing to purchase the lots. She then averred that the representations made by plaintiff were false, and known by her to be false at the time they were made, and that they were made by the plaintiff with intent to deceive the defendant; and that since her discovery that the representations made by the plaintiff as to the situation of the lots were false, she, the defendant, had refused to make any further payments under the contract. She prayed for a rescission of the contract and for a judgment against Mrs. Hock for the money she had paid on the lot. The district court specially found that this defense of Mrs. Bowman was sustained by the evidence, and also found that the lots were not worth as much by twenty-five dollars as they would have been had they been located as the plaintiff represented them to be; but refused the appellant a decree rescinding the contract, and deducted from the amount due Mrs. Hock on the contract the twenty-five dollars, and rendered a decree ordering the lots to be sold for the payment of the remainder. From this decree Mrs. Bowman prosecutes an appeal to this court.

1. This appeal presents only the question of the correctness of the conclusion of law made by the court on the finding. The question is, Were the false representations made by appellee as to the situation of these lots of such materiality as to entitle the appellant to a rescission of the contract? The appellant desired these lots for the purpose of building thereon. This fact was known to the appellee. The appellee's agent showed these lots to the appellant, pointed out the corners and stakes, represented that lot No. 1 was a corner lot, that No. 2 was contiguous thereto, and that both fronted on Sawyer street. The addition of which the lots were a part had been platted by the appellee, but the streets had not

been opened. We think these representations, under the circumstances, were material; and since they were believed, relied, and acted upon by the appellant, she was entitled to a rescission of the contract; but if ⁸³ she chose to ratify the contract, she might have done so and sued the appellee for damages and recovered the difference between what the lots were worth as located, and what they would have been worth had they been located as represented.

In *Delorac v. Conna*, 29 Neb. 791, S. resided in California, and owned a piece of land in this state worth twenty-five dollars per acre, which land she had never seen, and of whose location and value she had no knowledge. C. falsely represented to S. that the land was wild and unproductive, and that ten dollars per acre was far above its real value. Believing these representations, S. sold and conveyed the land to C. It was held that S. was entitled to a rescission of the contract.

In *Cruess v. Fessler*, 39 Cal. 336, it was held that a misrepresentation of the value of a business and goodwill knowingly made by the vendor was fraudulent, and entitled the purchaser to a rescission of the contract.

In *Livingston v. Peru Iron Co.*, 2 Paige, 390, the vendee applied to the vendor to purchase a lot of wild land, and represented to him that it was worth nothing except for the purpose of a sheep pasture, the vendee knowing at the time that there was a valuable mine on the land, of the existence of which the vendor was ignorant. It was held that the representations made by the vendee as to the value of the land, and his concealment from the vendor of the existence of the mine, were fraudulent, and entitled the vendor to a rescission of the conveyance he had made to the vendee.

In *Stevens v. Giddings*, 45 Conn. 507, the plaintiff offered a city lot for sale at auction. The auctioneer at the sale represented that the lot had a depth of one hundred feet. The purchaser relied upon this representation in buying the lot. It turned out afterward that the lot was but ninety-five and one-half feet deep. It was held that the representation was material, and that the purchaser was entitled to a rescission of the contract.

In *Roberts v. French*, 153 Mass. 60, 25 Am. St. Rep. 611, a lotowner ⁸⁴ sold his lot at auction. The auctioneer stated that the lot contained a certain number of square feet; that its lines were of a certain length, as ascertained by an actual

measurement made by himself. A bidder, relying upon these representations of the auctioneer, purchased the property. It was afterward discovered that the lot contained several hundred square feet less than it was represented to contain, and that the boundary lines of the lot were shorter than stated to be by the auctioneer. It was held that the representations were material, and entitled the purchaser to a rescission of the contract.

For other illustrations of misrepresentations as to the character, quality, and location made of real estate, entitling the purchaser to rescind the contract, see *McFerran v. Taylor*, 3 Cranch, 270; *Neil v. Cummings*, 75 Ill. 170; *Witherwax v. Riddle*, 121 Ill. 140; *Harvey v. Smith*, 17 Ind. 272; *Gifford v. Carvill*, 29 Cal. 589; *McGibbons v. Wilder*, 78 Iowa, 531; *McKinnon v. Vollmar*, 75 Wis. 82; 17 Am. St. Rep. 178; *Wilson v. Yocum*, 77 Iowa, 569; *Lynch v. Mercantile Trust Co.*, 18 Fed. Rep. 486. In this last case the agent of the owner went with the purchaser, showed the property, pointed out the boundary lines of it, and stated that the block included all the land lying between certain fences, and that its frontage on Fifth street was six hundred feet. The lot, in fact, had a frontage of only four hundred and seventy feet. It was held that the purchaser of the land was entitled to damages for the deceit, he having elected to ratify the contract.

2. To support this decree it is argued by the counsel for the appellee that, notwithstanding the false representations made by appellee as to the location of this property, yet, nevertheless, the appellant has precluded herself by her laches from rescinding the contract. The laches imputed to appellant are, that the plat of the addition, of which the lots are a part, was of record in the office of the register of deeds of Douglas county; that appellant, ⁸⁵ by consulting this plat in the recorder's office, could have ascertained that lot 1 was not a corner lot bounded on the north by Park street; and that, as she did not make this inquiry, she is estopped. The answer to this argument is twofold: 1. There is no evidence in this record to show that the plat of the addition was on record when the sale was made; 2. It would make no difference if it was. The purchaser of real estate has a right to believe and rely upon representations made to him by his vendor as to the character, quality, and location of the property when the facts concerning which the

representations are made are unknown to the vendee; and if a vendor makes material representations as to the character, quality, and location of his real estate, and the vendee believes, relies, and acts upon these representations, and they turn out to be false, the vendor cannot then shield himself from the consequences of his fraudulent conduct by interposing the plea of laches on the part of his vendee. This rule is supported by all the authorities.

Where one assumes to have knowledge of a subject of which another may be ignorant, and knowingly makes false statements regarding it, upon which the other relies to his injury, the party who makes such statements will not be heard to say that the person who took his word and relied upon it was guilty of such negligence as to be precluded from recovering compensation for injuries, which were inflicted on him under cover of falsehood: *Eaton v. Winnie*, 20 Mich. 156; 4 Am. Rep. 377.

The omission by one of the parties to an agreement to make inquiries as to the truth of facts stated by the other cannot be imputed to him as negligence. Every contracting party has an absolute right to rely on the express statement of an existing fact, the truth of which is known to the opposite party, and unknown to him, as the basis of a mutual agreement: *Mead v. Bunn*, 32 N. Y. 275.

In *Olson v. Orton*, 28 Minn. 36, a party falsely represented⁸⁶ that the lands which he was offering to sell included certain timber lands. The purchaser relied upon this statement, which proved to be false, and he then sued the vendor for damages for the deceit, and the court held that the vendor could not avoid the consequences of his false representations, merely because the purchaser might have consulted the records of the official surveys, had the land surveyed, and thus ascertained if the boundaries included the timber land.

In *Union Nat. Bank v. Hunt*, 76 Mo. 439, it was held that a purchaser of stock of a bank from the bank is entitled to rely upon assurances of an officer of the bank as to its financial condition, and if already a stockholder, is not bound to avail himself of his right of examining the books of the bank to ascertain whether the representations made to him were true.

In *Lynch v. Mercantile Trust Co.*, 18 Fed. Rep. 486, it was held: "The purchaser of land is entitled to rely upon the vendor's assertions about the boundaries, and is not obliged

to consult the recorded plat": To the same effect see *Simar v. Canaday*, 53 N. Y. 298; 18 Am. Rep. 523; *Carmichael v. Vandebur*, 50 Iowa, 651; *McKee v. Eaton*, 26 Kan. 226; *Risch v. Von Lillienthal*, 34 Wis. 250; *Witherwax v. Riddle*, 121 Ill. 140; *Davis v. Jenkins*, 46 Kan. 19.

In *Backer v. Pyne*, 130 Ind. 288, 30 Am. St. Rep. 231, it is said: "A false and fraudulent representation may be relied on by a person having no actual knowledge, although the fact in question is a matter of public record."

The decree appealed from is reversed and the cause remanded to the district court, with instructions to enter a decree in favor of the appellant canceling the contract in suit, and to take an account of the amount paid by the appellant to the appellee on said contract and render a judgment in favor of appellant therefor.

Reversed and remanded.

IRVINE, C., not sitting.

VENDOR AND PURCHASER—FALSE REPRESENTATIONS—RESCISSION.—Any representation by the vendor of land in regard to a material fact which operated as an inducement to the purchase, upon which the vendee had a right to rely, and by which he was deceived and injured, is actionable fraud: Note to *Holst v. Stewart*, 42 Am. St. Rep. 447; monographic note to *Cottrill v. Krum*, 18 Am. St. Rep. 555-563, on action to recover for false representations. This applies to misrepresentations as to quantity: *Roberts v. French*, 153 Mass. 60; 25 Am. St. Rep. 611, and note; and location: *Gunther v. Ullrich*, 82 Wis. 222; 33 Am. St. Rep. 32, and note; and some cases hold that it applies to misrepresentations as to value: Note to *Cottrill v. Krum*, 18 Am. St. Rep. 557; *Cressler v. Rees*, 27 Neb. 515; 20 Am. St. Rep. 691. Misrepresentation of material facts regarding the quality and title to land made by the vendor, and relied upon by the vendee as true, is sufficient ground for rescission of the sale: *Cressler v. Rees*, 27 Neb. 515; 20 Am. St. Rep. 691, and note. So, where a contract for the sale of land is made by a vendor, through the agents of the vendee, and upon their false representations that the vendee is another than the true purchaser: *Ellsworth v. Randall*, 78 Iowa, 141; 16 Am. St. Rep. 425, and note. Representations of the vendor as to extrinsic facts affecting the quality or value of the thing sold which are peculiarly within his knowledge may be relied on by the purchaser, and if the representations are false, and the purchaser is misled thereby to his injury, he may maintain an action for damages: Note to *Durkin v. Cobleigh*, 32 Am. St. Rep. 441. Delay in seeking the rescission of a contract is not fatal where it is the result of the complainant's misplaced confidence in false statements made to him: *Brown v. Norman*, 65 Miss. 369; 7 Am. St. Rep. 663.

LITTLEFIELD v. STATE.

[42 NEBRASKA, 223.]

TAXATION—LEGISLATURE CANNOT AUTHORIZE UNDER PRETENSE OF SANITARY REGULATIONS.—The legislature cannot authorize the power of taxation under the pretense of sanitary regulations or other exercise of the police power of the state in the interest of the public health or safety.

MUNICIPAL CORPORATIONS—EXERCISE OF POWER TO LICENSE OR REGULATE BUSINESS AS A SANITARY MEASURE.—If authority is conferred upon a city to license and regulate a particular business or occupation as a sanitary measure, such power must be exercised in the interest of the public health or safety, and not as a means of raising revenue.

MUNICIPAL CORPORATIONS—POWER TO LICENSE SALE OF MILK.—The city of Omaha has power, under its charter, to license and regulate the sale of milk within its limits, and may lawfully exact a reasonable license fee from all persons engaged in the business.

MUNICIPAL CORPORATIONS—REASONABLENESS OF LICENSE FEE EXACTED IS REVIEWABLE BY THE COURTS.—The courts have power to inquire into the reasonableness of a fee exacted by a city in the exercise of its power to license or regulate any particular business or occupation, but they will give a wide latitude for the exercise of legislative discretion in the matter.

MUNICIPAL CORPORATIONS—PRESUMPTION AS TO VALIDITY OF ORDINANCE PROHIBITING SALE OF MILK WITHOUT A LICENSE.—If an ordinance prohibiting the sale, or keeping for sale, of milk without a license is clearly within the general powers of a city, it is presumed to be reasonable, and will not be declared void by the courts unless it is shown to be unreasonable.

MUNICIPAL CORPORATIONS—LICENSE.—AN ORDINANCE licensing or regulating a particular business or occupation will not be held void simply because it provides for a fund to be derived from license fees.

MUNICIPAL CORPORATIONS—ORDINANCE PROHIBITING SALE OF MILK WITHOUT A LICENSE WILL BE UPHOLD WHEN.—A city ordinance prohibiting the sale, or keeping for sale, of milk without a license will be upheld by the courts if it is plainly intended as a police regulation, and the revenue derived from the license fee is not disproportionate to the cost of enforcing the ordinance and regulating the business, irrespective of how the city applies the fees realized.

Estabrook & Davis, for the appellant

George H. Hastings, attorney general, *E. J. Cornish*, and *W. S. Shoemaker*, for the state.

224 Post, J. The plaintiff in error was by the district court for Douglas county found guilty of the violation of an ordinance of the city of Omaha, which prohibits the selling, or keeping for sale therein, of milk by any person without a license. From the judgment against him he has prosecuted proceedings in error to this court. The proposition upon which he relies for a reversal of the judgment of the district

court is that the ordinance in question, in so far as it exacts the payment from him of a license fee of ten dollars, is in excess of the authority conferred upon the city, and therefore void. The ordinance is too voluminous to be set out at length in this opinion, but its scope and character are indicated by the title thereof, to wit: "An ordinance regulating the production and sale of milk in the city of Omaha and providing for the appointment of a milk inspector and prescribing his duties." The provision thereof with respect to license fees is as follows: "Every person, firm, or corporation producing milk or cream for sale and selling the same in the city of Omaha, ²²⁵ and every person, firm, or corporation selling or offering for sale, or keeping for sale, any milk or cream from any milk depot, store, or other establishment or place of business in the city of Omaha, and every person selling or delivering milk from any wagon or other vehicle within the city of Omaha, shall pay a license fee of \$10 per year; *provided*, that when more than one wagon or other vehicle is used by any person, firm, or corporation in the delivery of milk or cream in the city of Omaha an additional license fee of \$10 per year shall be paid for each additional wagon; *and provided further*, that any person owning only one cow and delivering milk by hand shall pay a license fee of \$2 per year, and any person owning only two cows and delivering milk by hand, or any person delivering milk by hand from any milk depot, store, or other establishment or place of business, shall pay a license of \$5 per year."

The sections of the city's charter which relate to the subject under consideration are: Section 41, chapter 12 *a* of the Compiled Statutes, entitled "Cities of the metropolitan class," by which it is provided that "the mayor and council shall have power . . . to provide for, license, and regulate the inspection and sale of meats, flour, poultry, fish, milk, vegetables, and all other provisions or articles of food exposed or offered for sale in the city," etc. Section 30, which provides for a board of health which "shall have control and supervision of meats, food, drinks, and the inspection, condemnation, use, sale, and disposition thereof. . . . Inspectors of meats, milk, food, and of any and all other matters and things relating to the sanitary condition of such city shall be under the control and direction of said board of health." Section 79, providing for a system of taxation, among other purposes named, "for payment of the expenses of the board of health

not exceeding one mill on the dollar valuation in any one year, taxes levied for said purpose to constitute a special fund therefor," etc.

²²⁶ In the able brief submitted by counsel for the plaintiff in error they conceded the power of the city by ordinance to prescribe needful and proper rules for the inspection and sale of milk and like commodities therein as a reasonable sanitary measure. They also admit the power of the city to require dealers in such commodities to procure license and to exact a reasonable fee therefor; but they argue that it cannot require the payment of a fee in excess of the cost of issuing the license, on the ground that such a demand is unreasonable and therefore prohibited both by its charter and the general rules defining the powers of municipal bodies. In support of that contention we are referred to Tiedeman on Limitations of Police Power, 101; *City of Leavenworth v. Booth*, 15 Kan. 627; *City of St. Paul v. Traeger*, 25 Minn. 248; 33 Am. Rep. 462, and *Muhlenbrinck v. Commissioners of Long Branch*, 42 N. J. L. 364; 36 Am. Rep. 518. The doctrine of those authorities and many others which we have examined is that the legislature cannot authorize the power of taxation under the pretense of sanitary regulations or other exercise of the police power of the state in the interest of the public health or safety. That principle was distinctly recognized by this court in the recent case of *Smiley v. MacDonald*, 42 Neb. 5, *ante*, p. 684, in which the test is said to be whether the measure in question has some relation to the public welfare, and whether such is in fact the object sought to be attained; but by taxation, as the term is here employed, is meant the providing of revenue for the ordinary expenses of state or municipal government. It does not follow, therefore, that an ordinance will be held void simply because it provides for a fund to be derived from license fees. Such a measure will be upheld by the courts whenever it appears to have been designed to promote the welfare of the public, and the revenue derived therefrom is not disproportionate to the cost of its enforcement and the regulation of the business to which it applies: See Cooley on Taxation, 2d ed., 598; Tiedeman on Limitations of Police Power, 101; 2 Beach on Public Corporations, ²²⁷ sec. 1255; *State, North Hudson etc. Ry. Co. v. City of Hoboken*, 41 N. J. L. 71; *People v. Mulholland*, 82 N. Y. 324; 37 Am. Rep. 568; *Van Baalen v. People*, 40 Mich. 258; *City of Chicago v. Bartee*, 100 Ill. 57; *Kinsley v. City of Chi-*

cago, 124 Ill. 359. As said by Professor Tiedeman in the section above cited, "What is a reasonable sum must be determined by the facts of each case; but where it is a plain case of police regulation, the courts are not inclined to be too exact in determining the expense of procuring the license as long as the sum demanded is not altogether unreasonable"; and in section 123 of Tiedeman on Municipal Corporations, the same author says: "And although it is a judicial question whether the sum exacted is a reasonable one, a wide latitude is given to the exercise of legislative discretion in the determination of the amount of the license fee." In some of the cases cited the courts have taken notice, without proof, that the fee exacted is unreasonable. For instance, in *State, North Hudson etc. Ry. Co. v. City of Hoboken*, 41 N. J. L. 71, the court declared as a matter of law that a fee of fifteen dollars for each one-horse car and twenty-five dollars for each two-horse car was unreasonable. On the other hand, in *People v. Mulholland*, 82 N. Y. 324, 37 Am. Rep. 568, the fee named was not less than five dollars, and not more than ten dollars, to be fixed by the mayor, for each wagon used in selling milk, yet it was held reasonable; and in *Kinsley v. City of Chicago*, 124 Ill. 359, the ordinance which was upheld imposed a license fee of fifteen dollars per year upon all vendors of meat.

In the case at bar there is a stipulation of record by the plaintiff in error to the effect that he was at the time named engaged in selling milk, as charged, in the city of Omaha without license; and that in case the ordinance, which exacts from him a fee of ten dollars, is held to be valid, judgment shall be entered as on a plea of guilty. It will thus be observed that the case is submitted to us as if upon demurrer to the information. When the measure, which is the subject of the ordinance, is, as in this instance, clearly within the general powers of the city, the presumptions are ³²⁸ in favor of its reasonableness, and the judicial power of the state cannot be invoked for the purpose of declaring it void unless from the inherent character thereof, or from proofs adduced, it is shown to be in fact unreasonable: See *State v. City of Trenton*, 53 N. J. L. 132; *Van Hook v. City of Selma*, 70 Ala. 361; 45 Am. Rep. 85; *Atkins v. Phillips*, 26 Fla. 281; *City of St. Louis v. Weber*, 44 Mo. 547; *Commonwealth v. Patch*, 97 Mass. 221; Parker and Worthington on Public Health and Safety, 312. By an application of that rule to the case before

us we reach the conclusion that the ordinance assailed is a reasonable exercise of the power conferred by law upon the city.

But it is suggested by counsel that the rule as here stated is inapplicable to this case, since by provision of the constitution all license money belongs to the school fund of the city, the fees provided for cannot be applied to the purpose of enforcing the ordinance, and are, therefore, unnecessary and unreasonable. In this connection they refer also to the provision contained in section 79 of the city's charter for the levy of a tax to defray the expenses of the board of health, and which is to constitute a special fund for that purpose. The constitutional provision referred to is section 5 of article 8, which reads as follows: "All fines, penalties, and license moneys arising under the general laws of the state shall belong and be paid over to the counties, respectively, where the same may be levied or imposed, and all fines, penalties, and license moneys arising under the rules, by-laws, or ordinances of cities, villages, towns, precincts, or other municipal subdivisions less than a county, shall belong and be paid over to the same respectively. All such fines, penalties, and license moneys shall be appropriated exclusively to the use and support of common schools in the respective subdivisions where the same may accrue." If that provision applies to ordinances like the one here involved, and which for the purposes of the present controversy may be conceded, it follows that the cost of enforcing ²²⁹ the ordinance and regulating the business of producing and selling milk must be paid from funds provided by taxation, instead of by license fees. But of what avail is that fact to the accused in this prosecution? Upon what ground can he be heard to complain because the fees realized are not applied directly to relieve the burdens which are by means of his business imposed upon the city? We take notice that provision is made by statute for the levy of a school tax by cities of the metropolitan class not exceeding two per cent annually upon their assessed valuation. To the extent that the school fund of the city is enriched by the proceeds of fines and licenses is the necessity for taxation diminished. The fact, therefore, that the expenses incident to an enforcement of the ordinance are payable out of a fund provided by taxation is a matter of no consequence either to the accused or the city. That view is in accordance with the rule stated by Professor Tiedeman, as will be observed from the foregoing citations.

It follows that the judgment of the district court is right and should be affirmed.

MUNICIPAL CORPORATIONS—EXERCISE OF POWER TO LICENSE OR REGULATE BUSINESS AS A SANITARY MEASURE.—The state may enact laws for the preservation of the public health, even at the expense of private rights, and may delegate that power to municipalities: *Charleston v. Werner*, 38 S. C. 488; 37 Am. St. Rep. 776, and note, showing that the police power of a state extends to all regulations affecting the lives, limbs, health, comfort, good order, peace, good morals, and safety of society. A license is issued under the police power, but the exaction of a license fee, with a view to revenue, would be an exercise of the right of taxation. The state may confer upon municipal corporations the authority to pass license laws, but a distinction is made between the power to license merely for the purpose of regulation, and the power to exact license fees with a view to revenue. In the former case the license cannot be used for purposes of raising revenue, unless such seems to be the legislative intent, and only a reasonable fee for the license and the labor attending its issue can be charged: See monographic note to *People v. Naglee*, 52 Am. Dec. 331, on the power of the state to exact licenses and charge therefor, and to *Robinson v. Mayor*, 34 Am. Dec. 627-643, on general limitations on the power of municipal corporations to pass ordinances. A municipal corporation has incidental power to enact sanitary regulations, but if an ordinance goes beyond or outside of this power, it cannot be sustained thereunder: *City of St. Paul v. Laidler*, 2 Minn. 90; 72 Am. Dec. 89. A city authorized to regulate any given subject and to require those who do any act to obtain a license or permit therefor may charge the person procuring it a reasonable fee to cover the labor and expense attending its issue and imposed by the business, although the power to do so is not expressly given in the charter: *City of St. Paul v. Dow*, 37 Minn. 20; 5 Am. St. Rep. 811; *City of Jacksonville v. Ledwith*, 26 Fla. 163; 23 Am. St. Rep. 558. This fee is not a tax, nor its exaction an exercise of the taxing power: *City of St. Paul v. Dow*, 37 Minn. 20; 5 Am. St. Rep. 811. It is not a tax for revenue, but a charge under the police power: *City of Jacksonville v. Ledwith*, 26 Fla. 163; 23 Am. St. Rep. 558. The right of property or business cannot, however, be invaded under the guise of police regulations for the benefit of the public health or good order when it is manifest that such is not the object or purpose of the enactment or ordinance: *Chaddock v. Day*, 75 Mich. 527; 13 Am. St. Rep. 468; note to *Robinson v. Mayor*, 34 Am. Dec. 633, 634, giving illustrations of reasonable and unreasonable ordinances. The public are entitled to protection against fraud and imposition, as by the sale of adulterated milk, and protective laws may be adapted to the nature of the case: See monographic note to *Butler v. Chambers*, 1 Am. St. Rep. 649, on the power of the state to regulate or prohibit the sale or manufacture of articles, and showing that such laws deprive no man of his property or of any right to pursue an honest calling. The presumption is, that an ordinance is reasonable, and the burden of showing its invalidity is upon the party who denies its validity: *Mayor v. Dry Dock etc. R. R. Co.*, 133 N. Y. 104; 28 Am. St. Rep. 609, and note; *State v. Fourcade*, 45 La. Ann. 717; 40 Am. St. Rep. 249. The reasonableness of an ordinance is a proper subject for judicial inquiry: *Champer v. Greencastle*, 138 Ind. 399; 46 Am. St. Rep. 390.

POPE v. BENSTER.

[42 NEBRASKA, 804.]

EXECUTION SALE UNDER SATISFIED JUDGMENT.—One whose land has been levied on and sold under a judgment which has in fact been paid, though not satisfied of record, may treat the sale as void, and recover the land, or, at his election, waive the invalidity of the sale, and sue the execution creditor for the value of the land.

JUDICIAL SALES OF REAL ESTATE.—The rule of caveat emptor applies to one who purchases real estate at a judicial sale thereof.

DAMAGES—MEASURE OF, FOR WRONGFUL CONVERSION OF REAL ESTATE.—

In an action to recover damages for the wrongful conversion of real estate, the measure of damages is the fair market value of the land at the time of its sale on the void execution.

ESTOPPEL AS TO JUDGMENT CREDITOR UNDER VOID EXECUTION SALE.—In an action to recover damages for the wrongful conversion of real estate by an execution sale thereof under a judgment which has already been paid, the defendant is estopped from making the defense that the sale was void.

John Patterson, for the appellant.

J. C. Martin and Albert & Reeder, for the appellee.

305 RAGAN, C. Joshua G. Benster brought this suit in the district court of Merrick county against James H. Pope, alleging in his petition in substance that on January 23, 1886, D. Martin & Co. recovered a judgment against one Phoebe Asher and another in the county court of Merrick county; that Martin & Co. duly sold and assigned said judgment to one John A. Carley; that Carley, in the year 1887, caused a duly certified transcript of said judgment to be filed and docketed in the office of the clerk of the district court of Platte county, Nebraska; that on March 8, 1888, said Asher 306 owned the following described real estate, situate in said Platte county, to wit: The southwest quarter of the southeast quarter of section 17, and the northwest quarter of the northeast quarter of section 20, all in township 16 north and range 2 west of the sixth principal meridian; that on said eighth day of May, 1888, said Asher duly sold and conveyed said real estate to him, the said Benster; that on the eighth day of June, 1889, said Carley sold and assigned said judgment to the said James H. Pope; that about March 4, 1890, said judgment was paid in full to Pope, and that he on said date entered a satisfaction and discharge of the same in the office of the clerk of the district court of Merrick county, Nebraska (it seems that a duly certified transcript of said judgment had also been filed in the office

of the clerk of the district court of Merrick county); that Pope did not file in the office of the clerk of the district court of Platte county any release and discharge of said judgment; that on April 15, 1890, said Pope caused the clerk of the district court of Platte county to issue an execution on said transcribed judgment, and caused the sheriff of said county to levy the same on the above-described real estate, then and there the property of said Benster, and caused said sheriff to appraise, advertise, and sell said real estate at public auction to make and raise the amount apparently due and unpaid on said transcribed judgment; that the clerk of said court, in pursuance of the instructions of said Pope, did issue such execution; that the same was, by the sheriff of Platte county, levied upon said lands; that they were duly appraised, advertised, and sold and purchased by one McAllister; that the sale was duly reported to the district court of said Platte county, and by said court confirmed, and, in pursuance thereof, a deed of conveyance of said premises was executed by said sheriff to the said McAllister, and the proceeds of said sale paid to and received by said Pope; that at the time of the sale of said real estate by said sheriff the said Benster resided ³⁰⁷ in Merrick county, Nebraska, and had no knowledge or notice whatever of the levy upon or sale of said premises until after such sale had been confirmed, and a deed executed to McAllister in pursuance thereof. The prayer of the petition was for a judgment against Pope for one thousand dollars as damages. The answer of Pope to this petition, so far as the same need be noticed here, was a traverse or general denial of all the material allegations thereof. Benster had a verdict and judgment for six hundred dollars, to reverse which Pope brings the case here for review. To reverse the judgment of the district court plaintiff in error argues in his brief here four points:

1. The first point is that instructions Nos. 7 and 9, given by the court to the jury on its own motion, were inconsistent and misleading. The assignment of error in the motion for a new trial and in the petition in error, as well as to these instructions, is: "The court erred in giving paragraphs 7, 8, 9, and 10 of the instructions given by the court on its own motion." Instruction number 8 complained of was as follows: "The jury are instructed that if from the evidence they believe that the defendant caused or procured an execution to be issued out of the district court of Platte county,

after the same had been by the defendant discharged upon the judgment record of the district court of Merrick county, and thereby satisfied or canceled, then such causing or procuring of said execution to be issued out of the district court of Platte county would be illegal and wrongful on the part of the defendant, and in that event he would be liable to the plaintiff for the value of the interest of the plaintiff in said lands." We are quite clear that the court did not err in giving this instruction; and since the assignment is that the court erred in giving all four of the instructions, we cannot consider this assignment of error any further.

2. The second assignment of error is, that the court erred in rendering a judgment in favor of Benster for six hundred dollars. No ~~208~~ such an error as this is assigned either in the motion for a new trial filed in the district court or in the petition in error filed here, and for that reason we cannot consider it.

3. The third alleged error argued is that the damages awarded Benster by the jury are excessive. The verdict of the jury was for fifteen hundred dollars, or five hundred dollars more than claimed by Benster in his petition; but the judgment rendered by the court in favor of Benster on the verdict is for six hundred dollars only. The evidence as to the value of the real estate was conflicting, many of the witnesses placing the value as high as twenty dollars per acre, or sixteen hundred dollars, while others placed its value at ten dollars per acre, or eight hundred dollars. It appears also from the record that at the time the land was sold by the sheriff there was an encumbrance upon it of nine hundred dollars, so that the evidence would have supported a finding of the jury that the value of Benster's interest in the land at the time it was sold on execution by the sheriff was as much as seven hundred dollars. We cannot say, therefore, that the judgment of six hundred dollars rendered in favor of Benster is greater than the value of his interest in the real estate at the time it was sold by the sheriff.

4. The fourth argument relied upon by counsel is that the judgment pronounced is contrary to the law of the case. The argument made to support this contention is, that as the judgment owned by Pope against Asher had in fact been paid and discharged, that therefore the sale of the real estate made by the sheriff of Platte county, at the instance of Pope, was absolutely void, as a sale made under an execution is—

sued upon a judgment which has in fact been paid is not voidable, but absolutely void. We do not question the correctness of counsel's position that the sale made of Benster's real estate by the sheriff of Platte county on the execution issued by the clerk of the district court thereof on the judgment which had been rendered against Asher, and which was owned by Pope, was void; but what we do say is, that such judgment having been paid to Pope, and, notwithstanding its payment, he having caused the clerk ³⁰⁹ of the district court of Platte county to issue an execution on the judgment, having caused the sheriff of that county to levy upon this real estate and sell it, having caused the sale made thereof to be confirmed and a deed executed to the purchaser thereof, and having received and converted to his own use the proceeds of such sale, he is now estopped from alleging as a defense to this action that the sale was void. It is true that this action is, in effect, one brought by Benster against Pope to recover damages of the latter because of his wrongful conversion to his own use of the real estate of the former. It is also true that we have been unable to find any case where real estate has been made the subject of a suit in the nature of conversion; but we know of no good reason why it cannot be. It is true that the rule of caveat emptor applies to one who purchases real estate at a judicial sale thereof; and that if real estate be sold upon an execution issued upon a judgment which has in fact been paid and satisfied, that such sale would be void as against the owner thereof, and the purchaser thereat would not be protected as against such owner. This is as true of a sale made of personal property as it is of one made of real estate. If one should purchase a horse and buggy sold under an execution issued on a judgment, which judgment had in fact been paid, such purchaser would acquire no title to said property as against the owner; but such owner would undoubtedly have the right to take the property itself, or to waive the taking of the property and the invalidity of the sale and sue the officer and the plaintiff in execution for a conversion thereof; and if he did sue for conversion, his action would have to be founded upon the fact that the judgment on which the execution was issued had been paid and satisfied, and that the sale was therefore void. Why, then, should not one whose real estate has been levied upon and sold on a satisfied judgment have the same right to treat the sale as void or voidable, and at his election recover

the real estate sold, or sue the execution ³¹⁰ creditor for the value of his interest in the real estate?

The judgment of the district court is affirmed.

Post, J., not sitting.

VOID AND VOIDABLE EXECUTION SALES.—An execution issued under a void judgment is absolutely void, and may be attacked collaterally as well as directly, and its enforcement may be restrained by injunction: *Olsen v. Nunnally*, 47 Kan. 391; 27 Am. St. Rep. 296. An execution or foreclosure sale based upon a vacated or satisfied judgment is void: *Soukup v. Union Ins. Co.*, 84 Iowa, 448; 35 Am. St. Rep. 317; *Bullard v. McArdle*, 98 Cal. 355; 35 Am. St. Rep. 176, and note, showing that where the satisfaction has not been entered on the record the sale, in some states, is voidable only. In *Nichols v. Dissler*, 31 N. J. L. 461, 86 Am. Dec. 219, it is held that a defendant may settle a judgment debt with the plaintiff upon such terms as they may agree to, and that, as between themselves, this arrangement will be perfectly valid; but that they cannot thus wipe out a record to the prejudice of other parties, and that the title of a bona fide purchaser for value under a judicial sale, where the judgment and order for sale remain in full force and unsatisfied of record, cannot be defeated by parol proof of a payment of the debt by the defendant in execution to the plaintiff before the sale. For contrary views see the dissenting opinion to the case last cited.

THE RULE OF CAVEAT EMPTOR applies to all execution sales: See note to *Velsian v. Lewis*, 3 Am. St. Rep. 203; as well as to other judicial sales: *Frost v. Atwood*, 73 Mich. 67; 16 Am. St. Rep. 560.

EXECUTION SALES—ESTOPPEL TO DENY VALIDITY OF.—One who has received the benefits derived from the proceeds of a judicial sale may be estopped to deny its validity though it was void: Note to *Hazel v. Lyden*, 37 Am. St. Rep. 278, and note.

FIRST NATIONAL BANK OF CHICAGO v. SLOMAN.

[42 NEBRASKA, 850.]

PARTNERSHIP—COMPLAINT AND JUDGMENT AGAINST INDIVIDUAL PARTNERS.

A complaint against defendants, designated by their individual names, and as partners doing business under a given firm name, is not against the firm named, but will support a personal judgment against the individual defendants therein named.

JUDGMENTS OF UNITED STATES COURTS AS DOMESTIC JUDGMENTS.—Courts of the United States within a particular state are not, in that state, regarded as foreign courts. Their judgments, in all respects, as to remedies are treated as domestic judgments.

CREDITOR'S BILL IN STATE COURT MAY BE FOUNDED UPON JUDGMENT OF FEDERAL COURT, WHEN.—An action in the nature of a creditor's bill can be maintained in a state court upon a judgment of a federal court sitting within that particular state, and the record of the judgment in the federal court is admissible in evidence.

Brome, Andrews & Sheean, for the appellant.

E. M. Bartlett and A. C. Wakeley, for the appellee.

252 Post, J. This is a proceeding in the nature of a creditors' bill, and comes into this court by appeal from a decree of the district court for Douglas county. It is alleged in the petition that in the year 1866 the plaintiff recovered judgment in the circuit court of the United States for the district of Nebraska against the defendants Morris H. Sloman and Eugene H. Sloman, doing business in the firm name of Sloman Bros.; that execution has been issued thereon and returned unsatisfied, said defendants, as well as the firm of Sloman Bros., being wholly insolvent. It is further charged that in the years 1887 and 1888 the said Morris H. Sloman purchased certain real estate, described therein, situated in Douglas county, with his individual means, and for the purpose of defrauding his creditors procured deeds therefor to be executed in the name of his wife, Cora H. Sloman, who is also made a defendant. A. F. Risser & Co., William B. Riley & Co., and Charles H. Wentz, judgment creditors of the Slomans, were also made defendants and answered, joining in the plaintiff's prayer to have the real estate in controversy subjected to the payment of their claims in the order to be determined by the court, and for general equitable relief. The allegations of the petition having been put in issue by answer, a hearing was had, resulting in a decree for the plaintiff and cross-petitioners substantially as prayed by them, and from which the defendant Cora H. Sloman alone appeals.

1. The first contention on this appeal is that appellees are not shown to be creditors of Morris H. Sloman, the alleged 253 equitable owner of the property mentioned, and that the judgments proved are against the firm of Sloman Bros. only. The title of the action by the plaintiff in the circuit court of the United States was "*The First National Bank of Chicago v. Morris H. Sloman and Eugene H. Sloman, late partners doing business as Sloman Bros.*" The judgment therein is as follows: "It is therefore considered and adjudged by the court that the plaintiff the First National Bank of Chicago recover from the defendants Morris H. Sloman and Eugene H. Sloman, partners doing business as Sloman Bros., the sum of fifteen hundred and four and $\frac{50}{100}$ dollars (\$1,504.50) and costs, herein taxed at \$——." The other judgments mentioned were rendered by the same court and are similar in form to the above.

In *King v. Bell*, 13 Neb. 409, which is a case in point, it is said: "Where the parties are designated by name as defend-

ants in the title, the addition of the relation they occupy to each other, such as a description of them as 'partners,' will not restrict the action to one against the firm alone." The case of *Morrissey v. Schindler*, 18 Neb. 672, relied upon by appellant, does not conflict with the above. The question involved in that case was whether a contract executed in the name of M. Bros. was admissible in the absence of an allegation that the defendants were doing business as partners. From the title of the cause against "J. C. M. and M. M., doing business under the name and style of M. Bros.," it was held so far an action against the firm as to render the contract admissible. It does not follow from the reasoning therein that such an allegation will not support a judgment against the individual defendants; but the question of the regularity of the proceedings in the circuit court not being involved in this appeal, it is apparent that further consideration of the subject would be out of place in this opinion. It is a sufficient answer to appellant's argument that the record set out above shows a judgment in fact against the ³⁵⁴ Slomans individually, and not against the firm of Sloman Bros.

2. It is next contended that "the judgment upon which the plaintiff's bill is based is not a domestic judgment, but is the judgment of a court of limited jurisdiction, and, so far as the courts of this state are concerned, a foreign judgment." That proposition, we admit, is not without support, but it is believed to be in conflict with the pronounced weight of authority. The question of the relation of the United States courts to the courts of the different states was recently considered by the supreme court of Wisconsin in the case of *Ballin v. Loeb*, 78 Wis. 404, in which it was held that the judgments of those courts should be treated as domestic judgments of the superior courts of the state, for the following reasons (we quote from the opinion), viz.: "1. They are liens on the land of the defendants: Acts of Congress, 1888, c. 729. 2. They are admissible in evidence as such when properly authenticated: Rev. Stats., sec. 4145. 3. In common-law causes the plaintiff is entitled to the same remedies by attachment or other process against the property of the defendant (U. S. Rev. Stats. sec. 915, and by section 914 the same practice, etc.), and modes and forms of proceeding in civil causes may be the same. By section 916 the judgment plaintiff in common-law causes is entitled to similar remedies upon the same to reach the property of the judg-

ment debtor. 4. They are respected by our courts, and the property of the defendant in the hands of a receiver appointed by the United States court in a Wisconsin district will not be disturbed by our courts. 5. They are treated, in all respects as to remedies, like domestic judgments of the state within which they are rendered": To the same effect are *Wandling v. Straw*, 25 W. Va. 705; *Thompson v. Lee County*, 22 Iowa, 206; *Barney v. Patterson*, 6 Harr. & J. 182; *Embry v. Palmer*, 107 U. S. 3; *Adams v. Way*, 33 Conn. 419; *McCauley v. Hargroves*, 48 Ga. 50; 15 Am. Rep. 660. The records of the judgments of the circuit court were, we think, properly admitted in evidence.

355 3. Finally, it is urged that the decree of the district court is not warranted by the proofs. This is shown by the record to be a typical case of its kind. In the year 1883 or 1884 Morris H. Sloman entered into partnership with his brother Samuel in the wholesale saddlery and harness business in the city of Omaha. Afterward Eugene H. Sloman also became a member of the firm. In the year 1886 Samuel withdrew and the business was thereafter conducted by the other members in the name of Sloman Bros. until June, 1886, when it failed with liabilities amounting to one hundred thousand dollars, nearly, if not quite, twice the amount of its assets. Of the original capital of the firm, Samuel Sloman contributed about fifteen thousand dollars, and Morris H. less than three thousand dollars. The amount drawn out by the former at the time he retired from the firm is not disclosed by the record, but presumably the amount of his contribution thereto. The circumstances attending the failure are of a suspicious character, and sufficient to suggest grave doubts of the good faith of the partners. The appellant Cora H. Sloman, at the time of her marriage in 1884, was possessed of a small sum of money, not exceeding two hundred and fifty dollars, the proceeds of her own earnings. Shortly after the failure she built a house in the city of Omaha which cost in the neighborhood of eighteen thousand dollars, and the family lived in a style indicating abundant means. About that time Morris H. Sloman engaged in business as a real estate broker in the city of Omaha in the name of his wife, the appellant, and is shown to have speculated extensively in real estate, ostensibly in her name under and by virtue of a power of attorney executed by her. It is admitted that no accounting was ever had between them of the

business carried on in her name, nor does she appear to have a very definite idea of the amount or character of such transactions. About one year later Sloman opened a bank in his wife's name and thereafter transacted a banking business until about the time of the institution of proceedings in the circuit court of the United States by other creditors of ³⁵⁶ Sloman Bros., to subject the property in his wife's name to the satisfaction of the partnership indebtedness. There are other facts tending to sustain the finding of the district court, but it is evident from the foregoing statement that the decree should not be disturbed on this appeal, and it is accordingly affirmed.

JUDGMENT AGAINST PARTNERS—DESIGNATION OF PARTIES.—A judgment describing the parties against whom it is rendered by their partnership name is valid, although in the action in which the judgment is rendered they are sued as individuals composing a partnership and as joint debtors, and designated by their individual names in the pleadings, including the caption to the judgment entry itself: *Olson v. Veasey*, 9 Wash. 481; 43 Am. St. Rep. 855.

A JUDGMENT OF A UNITED STATES COURT, though in some respects a foreign judgment, is not so in the full sense of the term: *Town of St. Albans v. Bush*, 4 Vt. 58; 23 Am. Dec. 246; note to *Tarbell v. Griggs*, 23 Am. Dec. 792. A state court must give to it the same force and effect that it would give to its own judgments, or those of a sister state: *Oceanic Steam Nav. Co. v. Compania etc. Española*, 134 N. Y. 461; 30 Am. St. Rep. 685.

CREDITOR'S BILL ON JUDGMENT OF FEDERAL COURT.—As to whether such a bill can be maintained there is a conflict of authority, some of the cases holding that it cannot be and others that it can: *Tarbell v. Griggs*, 3 Paige, 207; 23 Am. Dec. 790, and note.

HOME FIRE INSURANCE COMPANY v. BEAN.

[42 NEBRASKA, 587.]

INSURANCE—DEMAND FOR ARBITRATION WAIVES PROOFS OF LOSS.—If an insurance company makes a demand for arbitration, it is a waiver of the proofs of loss.

INSURANCE—PLEADING—NONPREJUDICIAL ERROR.—If a policy of fire insurance, as an exhibit, is made part of the petition, and is admitted by the answer, it becomes a part of the record. Hence, if some of its provisions are again pleaded in the answer as substantive matters of defense, and the answer is demurred to, it is not prejudicial error to sustain the demurrer.

INSURANCE—ARBITRATION—VOID AS OUSTING COURTS OF JURISDICTION.—A provision in a policy of fire insurance that no action against the company shall be sustained in any court of law or chancery until after an

award shall have been obtained by arbitration fixing the amount due after a loss is void, as it ousts the courts of their jurisdiction.

INSURANCE—AMOUNT WRITTEN IN POLICY CONTROLS.—The amount written in a policy of fire insurance on real property must be taken as the true amount of the loss, if the property is wholly destroyed, where the statute provides that, in case of total destruction, such amount shall be taken as the true value of the property, amount of loss, and measure of damages; and any provision in the policy attempting to limit the amount to a less sum is void.

Jacob Fawcett, for the appellant.

S. W. Christy, for the appellee.

539 HARRISON, J. The petition filed in this case in the district court of Thayer county alleged for a cause of action against the Home Fire Insurance Company of Omaha that the plaintiff therein, Mrs. R. J. Bean, was, on the sixth day of April, 1891, the owner of a certain hotel building in the village of Davenport, in Thayer county, and procured on said day a policy of insurance, No. 51,277, to be issued to her by the company, by which she was insured against loss or damage by fire to the hotel building in the sum of \$1,200; that the building was afterward damaged by fire, and the company paid the sum of \$88.45 in full settlement of such damage on October 15, 1891, and was duly credited therefor on the policy, reducing the amount to the sum of \$1,111.55, for which it remained in force from and after October 15, 1891; that on November 14, 1891, the building was totally destroyed by fire, of which the plaintiff (defendant in error) gave the company notice and proof, and demanded payment of the loss, and has duly performed on her part all the conditions of the policy of insurance; that the company demanded, in writing, arbitration of the loss, and, after arbitrators had been chosen, withdrew the name of its arbitrator, but continued negotiations for settlement, and subsequently demanded that a new board of arbitrators be appointed to fix the amount of the loss; that the building was, when burned, of the value of \$1,700, and there was no other insurance thereon. The prayer of the petition was for judgment in the amount of \$1,111.55, and interest at seven per cent per annum from November 16, 1891, and the allowance of a reasonable attorney's fee, and other costs. To this petition there was filed for the company the following answer:

540 "1. The defendant admits that it is a corporation as alleged in the plaintiff's petition; admits that on the 6th day

of April, 1891, it issued to the plaintiff its policy of insurance covering the property described in plaintiff's petition; admits that on the 15th day of October, 1891, it paid the plaintiff the sum of eighty-eight and $\frac{45}{100}$ dollars (\$88.45) in full settlement for damage caused to the property covered by said policy by fire on October 9, 1891; admits that said payment reduced the amount of said policy to the sum of one thousand one hundred and eleven dollars and fifty-five cents (\$1,111.55), and denies each and every other allegation in plaintiff's petition contained.

"2. As a further defense to the plaintiff's action the defendant alleges that the amount of the defendant's liability under and by virtue of said policy was, by the terms and conditions of said policy, limited to three-fourths the actual cash value of said property covered by said policy at the time of the fire; and this defendant alleges that the actual cash value of said property at the time of said fire did not exceed the sum of \$1,000.

"3. Defendant further alleges that said policy of insurance contains the following conditions and agreements, namely: If differences of opinion arise between the parties hereto as to the amount of loss or damage, that question shall, at the written request of either party, be referred to two disinterested and competent men, each party to select one, who shall ascertain, estimate, and appraise the loss or damage; and in case of disagreement the two so chosen to select a third, who shall act as an umpire on disputed points only, and their award, in writing, duly sworn to, shall be binding on the parties hereto as to the amount of said loss or damage, but no appraisal or agreement for appraisal shall be construed as evidence of the validity of said policy or the company's liability therein; and each party to pay their own appraiser, and one-half the umpire's fee.

"4. The defendant further alleges, that in accordance ⁵⁴¹ with said agreement and conditions contained in said policy the defendant, after said fire, in writing, notified and requested the plaintiff to submit the differences of opinion between the plaintiff and this defendant, in relation to the amount of loss or damage which the plaintiff had sustained, to two disinterested and competent men, in accordance with the terms of said policy, to ascertain and estimate and appraise the said loss or damage, and requested the plaintiff to notify this defendant of the person whom the plaintiff had

selected to act as appraiser in that behalf; that thereupon the plaintiff did select an appraiser, and notified this defendant of said fact, whereupon this defendant selected one F. W. Hollingsworth, of Davenport, Nebraska, to act as its appraiser, and notified the plaintiff of that fact; that within a few days thereafter, and before any step had been taken by the plaintiff or defendant, or by the appraisers so appointed, to make any appraisement of said loss or damage, this defendant was informed that the said Hollingsworth was not a disinterested appraiser, whereupon the defendant at once, on the 11th day of January, 1892, notified the plaintiff in writing that this defendant withdrew the name of F. W. Hollingsworth to act as its arbitrator, and that it would within a reasonable time appoint another person to act as its arbitrator as aforesaid; that three days afterward, to wit, on the 14th day of January, 1892, this defendant notified the plaintiff that it had selected one Joseph Williams to act as its appraiser instead of said Hollingsworth; that two days later, to wit, on the 16th day of January, 1892, this defendant appeared at Davenport, Nebraska, with the said appraiser and notified the plaintiff that it was ready and willing to proceed at once to said appraisement, but the plaintiff, in violation of the terms, conditions, and agreements contained in said policy, failed, neglected, and refused to proceed with the appraisement, or to enter into any agreement for any future day upon which to appraise said loss or damage, if any, to ⁵⁴² said property; that subsequently thereto, to wit, in the latter part of January, 1892, this defendant again demanded of the plaintiff an arbitration of said loss and damage to said property, but the plaintiff again refused to enter into said appraisal; and the plaintiff had at all times since the said date refused to enter into any appraisement or arbitration of the amount of loss or damage which the plaintiff may have sustained by reason of said fire, by means whereof the defendant has been unable to ascertain or determine the actual amount of said plaintiff's loss or damage by fire under said policy; but the defendant is informed and believes that the actual loss and damage sustained by the plaintiff under said policy does not exceed the sum of one thousand dollars (\$1,000), and that by the terms of said policy the defendant would not in any event be liable for more than three-fourths of said amount, to wit, the sum of seven hundred and fifty dollars (\$750), but the defendant alleges that by reason of the failure and refusal

of the plaintiff to have the loss and damage by said fire appraised as required by said policy, prior to the commencement of this suit, said suit was at the time of its commencement premature.

"5. The defendant further alleges that the said policy of insurance contains the following agreements, restrictions, and limitations, to wit: '18. No suit or action of any kind against this company for the recovery of a claim under this policy shall be sustained in any court of law or chancery until after an appraisal and award shall have been made, if requested, fixing the amount of such claim in the manner above provided.'

"6. The defendant further alleges that no appraisal or award has been made fixing the amount of plaintiff's claim under said policy, although the same has been requested in writing by the defendant as hereinbefore set forth. Wherefore the defendant prays that the plaintiff's action be dismissed and the defendant recover its costs."

543 There was then filed for Mrs. Bean what was styled "a reply," but which was in fact a general demurrer to the second, third, fourth, fifth, and sixth paragraphs of the answer. This was, on hearing, sustained, an exception to the ruling was taken by counsel for the company, and the company declined to plead further. A jury was waived, and the case tried on its merits and submitted to the court, and at a subsequent date, during the same term, the court made a finding in favor of Mrs. Bean, and that there was due her from the company the sum of \$1,162.75, and allowed the further amount of \$60 as an attorney fee. Motion for a new trial was filed on behalf of the company, which was overruled and judgment was rendered in accordance with the findings. The company brings the case here for review.

It is argued by counsel for plaintiff in error that inasmuch as the company, in its answer, had denied that the loss was total, the defendant in error should not have been allowed to prove a waiver of the proofs of loss unless it was alleged in the petition or the reply, and that it was not alleged in either; that there was no evidence that proofs of loss were furnished, and hence the defendant in error was not entitled to recover, and the judgment should be reversed, and a new trial awarded. The petition contained the following allegation: "That the defendant company demanded an arbitration of said loss in writing, and after arbitrators had been chosen said

defendant withdrew the name of its arbitrator, but continued negotiations for settlement, and subsequently demanded a new board of arbitrators be appointed to fix amount of said loss." This was certainly a sufficient statement of a demand for arbitration, and was followed by proof of the fact. This was a sufficient pleading of the waiver of the proofs of loss, and amply supported by the evidence, and relieves this branch of the case of the objections urged against it. Both pleadings and evidence showed a waiver of proofs of loss. Where ⁵⁴⁴ arbitration is demanded, it is a waiver of the proofs of loss: *Walker v. German Ins. Co. of Freeport*, 51 Kan. 725, and cases there cited.

Another assignment is that it was error to sustain a demurrer to certain portions of the answer, and thus strike them from the answer, or exclude them from the issues. The petition pleaded the issuance of the policy, gave its number, and made it a part of the petition. The answer admitted the issuance of the policy, and denied that the loss was total. Under this condition of the pleadings, if the company had proved that the loss was not a total one, it would have been entitled to the benefit of all the provisions of the policy as they were pleaded and admitted to exist. The issuance and existence of the policy in its entirety had been pleaded by one party and admitted by the other, and had thus become a part of the record without further proof. Referring to that portion of the answer in which the demand for arbitration is alleged, and the further complaint that by reason of fault on the part of defendant in error the arbitration was not made, and that this being a condition of the policy upon the fulfillment of the requirements of which the company was entitled to insist, hence the suit was prematurely brought, and the contention that it was error for the court to sustain a demurrer to the part of the answer in which this was pleaded, we think the action of the court was not erroneous, as this court has decided that such a provision in the policy was void: *See German-American Ins. Co. v. Etherton*, 25 Neb. 505, and cases cited.

It is next claimed that the court erred in finding for the defendant in error for the full amount for which the suit was brought. The policy upon which the action was based stated that "in consideration of forty-two dollars do insure Mrs. R. J. Bean against loss or damage by fire to the amount of twelve hundred dollars (\$1200). . . . Other insur-

ance permitted, not to exceed three-fourths of the actual ⁵⁴⁵ cash value of the property. In case the amount of insurance exceeds three-fourths of the actual cash value at the time of fire, this company shall be liable only for its pro rata share of three-fourths of the actual cash value of said property." It might be said here that probably the part of the policy in which the above statement appears limiting, under the condition set forth, the liability to a share of the cash value only, refers to a loss where there is other insurance on the property, but it is contended by the counsel for the company that it applies to all cases and to the case at bar in the adjustment of the loss between the insurer and insured. In this we cannot agree with counsel. Our statute (on this subject see Comp. Stats. 1893, c. 43, secs. 43, 44) not only states that where the property shall be wholly destroyed that the amount written in the policy shall be taken conclusively to be the true value of the insured property, but that it shall also be the true amount of the loss and measure of damages. To give to the provision of the policy we have quoted the force and effect claimed for it would be in direct conflict with the provision of our statutes. This portion of the policy was invalid and could not be enforced.

The judgment of the district court is affirmed.

INSURANCE—DEMAND FOR EXAMINATION WAIVES PROOFS OF LOSS—ENOS v. ST. PAUL ETC. INS. CO.—A demand by an insurance company for the examination of the insured under oath according to the provisions of its policy is a waiver of proofs of loss: 4 S. Dak. 639; 46 Am. St. Rep. 796.

INSURANCE—OUSTING COURTS OF JURISDICTION—ARBITRATION AS TO AMOUNTS.—If a policy of insurance provides that every matter in dispute between the parties shall be submitted to arbitration, including the right to recover at all, such condition is void as an attempt to oust the courts of their jurisdiction; but a stipulation therein that amounts or values shall be submitted to arbitration is valid, and such arbitration may be made a condition precedent to the right to recover: *Niagara Fire Ins. Co. v. Bishop*, 154 Ill. 9; 45 Am. St. Rep. 105, and note; monographic note to *Utter v. Travelers' Ins. Co.*, 8 Am. St. Rep. 922, on whether parties may by their stipulations inserted in a contract make a rule of evidence by which the courts must be bound in litigation subsequently arising under such contract, showing that stipulations in a contract which assume to divest the courts of their established jurisdictions, and, as conditions precedent to an appeal to the courts, are void. If a policy of insurance contains a provision to pay the loss, a condition that if any difference or dispute arises touching the loss it shall be referred to arbitration will not prevent an action on the policy before the reference. Even a by-law of the company containing such a condition is no answer to an action on the policy: See monographic note to *Commercial Union Assur. Co. v. Hocking*, 2 Am. St. Rep. 566, 570, on agreements to submit to arbitration.

INSURANCE—CONCLUSIVENESS OF AMOUNT WRITTEN IN POLICY.—If, after a statute making the amount written in a policy of fire insurance, the true value of the property, the amount of the loss, and the measure of damages, in case of total destruction, takes effect, the parties stipulate for a different measure of damages, the amount written in the policy must control on grounds of public policy, and cannot be changed by such stipulation: *Reilly v. Franklin Ins. Co.*, 43 Wis. 449; 28 Am. Rep. 552.

HALEY v. STATE.

[42 NEBRASKA, 556.]

INTERSTATE COMMERCE—ORIGINAL PACKAGE.—If bottles of intoxicating liquor, each inclosed in a sealed paper box, and all the paper boxes packed in a wooden box, are shipped from one state to another, where each sealed paper box is sold separately, the wooden box, and not each sealed paper box; is the "original package"; and such sale, without authority, is in violation of the state law regulating the license and sale of malt, spirituous, and vinous liquors.

W. S. Morlan, for the appellant.

George H. Hastings, attorney general, for the state.

557 HARRISON, J. July 14, 1890, an information was filed in the district court of Harlan county, in one count of which the defendant (plaintiff in error) was charged with the unlawful sale of spirituous liquor to one Charles Hecht on the fourth day of July, 1890, in said county. From the record it further appears that on the thirteenth day of October, 1890, the plaintiff in error appeared in court accompanied by his attorney, and the state being represented by its attorneys, the case was called for trial, a jury was waived, and the case submitted to the court on the following stipulated statement of facts:

"That said defendant, A. L. Haley, on the fourth day of July, 1890, at Republican City, in Harlan county, Nebraska, did then and there sell to one Charles Hecht one-half pint of spirituous liquors, to wit, one-half pint of whisky, without obtaining a license, druggist's permit, or other authority therefor under the laws of the state of Nebraska.

558 "It is further stipulated that the liquor was sold by the said A. L. Haley, as agent for S. R. Cheadle, of St. Louis, Missouri, he having been appointed such agent by said S. R. Cheadle, as shown by Exhibit A, attached as a part of this stipulation; that the liquor was sold in a half-pint flask, packed in a paper box sealed with sealing wax, and was sold

without said paper box being broken, and was shipped from St. Louis directly to Republican City, and in that package was sold directly to said Charles Hecht, and that a number of those paper packages were packed in a wooden box and so shipped in said wooden box, and that this said package was in such wooden box, and said wooden box was opened to obtain said paper package therefrom."

Exhibit A is as follows:

"Know all men by these presents, that I, S. R. Cheadle, of the town of St. Joseph, in the state of Missouri, do hereby make, constitute, and appoint Anthony L. Haley, of the village of Republican City, in the state of Nebraska, my true, sufficient, and lawful agent for, and in my name, place, and stead, to sell and dispose of such beer, wine, brandy, whisky, and other goods and merchandise as I may see fit to ship to him to be sold in said village of Republican City, it being provided and distinctly understood that all goods and merchandise so shipped and sold by said Anthony L. Haley shall be sold only in the original packages in which the same are shipped, and that the said Anthony L. Haley shall not, directly or indirectly, sell or otherwise dispose of any beer, wines, brandy, or whisky for the period of one year from this date, except such as shall be shipped to him at said village of Republican City by me, and shall in no manner act as agent for any other person or persons, or engage in any other business than as agent for me for the period of one year from this date, dated this 3d day of July, 1890.

"S. R. CHEADLE.

"_____, Witness."

559 From a consideration of the foregoing statement the court adjudged the plaintiff in error guilty as charged in the information, and sentenced him to pay a fine of one hundred dollars and costs of the action. Motion for a new trial was filed on behalf of plaintiff in error, which was overruled, and he has duly prosecuted a petition in error to this court. As will be gathered from the foregoing stipulated statement of facts, it is admitted that the sale of the liquor occurred, and that the plaintiff in error had no license or permit from the proper authorities to make such sale. The only question raised and argued by counsel for plaintiff in error is that the sale of the half pint flask, inclosed in its paper box, and the box sealed with wax, was a sale by him, as agent, in the original package in which it had been shipped to him by his

principal from St. Louis, Missouri, to Republican City, in this state, and was a sale which was legal and allowable under the law regulating commerce between the states. The bottle of liquor sold was, it appears, packed with other bottles of liquor, similarly inclosed in sealed paper boxes, in a wooden box at St. Louis, the place of shipment, and in the wooden box shipped to and received by plaintiff in error at Republican City, the wooden box being opened, and the paper box containing the half pint of whisky taken therefrom and sold. The case turns entirely upon the determination of which was the "original package," the wooden box in which the several boxes were packed for shipment, or the sealed paper box in which the half pint flask of whisky was inclosed.

In the year 1890 the supreme court of the United States rendered a decision in the case of *Leisy v. Hardin*, 135 U. S. 100, popularly referred to as the "Original Package Decision," in and by which the doctrine was promulgated and established that intoxicating liquors could be imported or shipped into any state from any other state, and the importer or shipper could, by himself or agent, so long as the liquors were in the unbroken original package in which they were shipped, ⁵⁶⁰ sell them, regardless of the provisions of the law of the state into which the liquors were shipped. The case of *Leisy v. Hardin*, 135 U. S. 100, was by a divided court, there being a dissenting opinion written by Mr. Justice Gray and concurred in by Mr. Justice Harlan and Mr. Justice Brewer. The decision of *Leisy v. Hardin*, 135 U. S. 100, overruled and set aside what had been considered as the settled doctrine or rule upon the subject involved during a number of years prior to its announcement. The doctrine of the case was accepted by the state courts as authoritative, and followed, and was very quickly adopted, and advantage taken of the privilege it accorded, by parties manufacturers or sellers of liquors; and what, in popular parlance, were known as "original package houses" sprung into existence in many states where prohibitory laws or stringent license provisions had been enacted and were in force. There very soon followed an act of Congress called the "Wilson Law" (see act of Congress August 8, 1890, Pub. Laws, 51st Cong., First Sess., c. 728), which destroyed the force and effect of the decision in the case of *Leisy v. Hardin*, 135 U. S. 100. The act referred to was approved about three months after the announcement of the supreme court's decision. In the

mean time quite a number of cases had arisen in the courts of the states where the business of selling in original packages had been established, and the controversies in them had been, by habeas corpus or other proceedings, in many instances, transferred to the federal courts, and one of the questions, very often a disputed one, and adjudicated in these cases, was the one by which a definition of what was an original package was sought and necessary to a decision of the particular case. In discussing what is meant by an original package, in the case of *Commonwealth v. Schollenberger*, 156 Pa. St. 201, 36 Am. St. Rep. 32, the following language is used:

"We have examined the decisions of the supreme court of the United States for a definition of the term 'original package.' It ⁵⁶¹ does not seem, however, to have received, and perhaps at this time is not capable of, a precise definition that may be applied to it in all cases. The idea for which it stands is, however, not difficult of apprehension or statement. The methods adopted by manufacturers and importers for packing and preparing goods for transportation by sea or land differ with the differences in the character, bulk, and material of the merchandise itself. The general purpose is to adopt that form and size of package best adapted to the safe and convenient transportation and delivery of the particular class of goods to be moved, because the convenience of the trade will be best subserved thereby. Such packages, put up with a view to the convenience and security of transportation and handling, in the regular course of trade, are the original packages of commerce. If we look at the meaning of the word 'employed,' we are brought to the same conclusion. 'Original' means pertaining to the beginning or origin; the first or primitive form of a thing. 'Package' means a bundle or parcel made up of several smaller parcels, combined or bound together in one bale, box, crate, or other form of package. An 'original package' is such form or size of package as is used by producers or shippers for the purpose of securing both convenience in handling and security in transportation of merchandise between dealers in the ordinary course of actual commerce. Such packages are not always made up by putting smaller packages or bundles together, but may include any form of receptacle that shall hold a fixed quantity; as a barrel of sugar or salt, a bag of coffee, a chest of tea, and the like. The package must not

be divided or its unity destroyed. When it is received unbroken from the importer through the custom-house, or from the manufacturer by the ordinary channels of transportation, it is within the protection of the interstate commerce doctrine, and the state may not subject it to vexatious delays, appraisement, taxation, or trade restriction. But it has never been held that the importer ⁵⁶² might subdivide his package, and dispose of its several parts in detail. On the contrary, in many cases the United States courts have held that, upon such subdivision or breaking of bulk, the original package ceased to be such, and the goods became mixed with, and indistinguishable from, the merchandise already within the state, and therefore subject to state laws. This assigns to each jurisdiction its proper powers. The general government protects the citizens of the several states in the movement of their commodities across state lines for the purpose of commerce. The state regulates the retail trade conducted within its own borders, and forbids the sale of such articles to its citizens as it finds to be injurious to them."

In the case of *Keith v. State* and *Rion v. State*, 91 Ala. 2, decided by the supreme court of Alabama, it was held: "Where several bottles of liquor, each bottle separately wrapped in paper labeled 'original package,' and marked with the name of the importer, are placed in an open box, and shipped therein into the state, the box is the original package." In *Rion's* case it appeared that the bottles were each wrapped in paper marked "original package," and placed in an open box, with hay between them, the box marked with the number of bottles it contained, and their sizes, and, thus packed, they were shipped. In determining which was the original package, the court says in the text of the opinion: "Merely labeling each bottle 'original package' did not make it one, if it was not really an original package. The term 'to pack,' in its ordinary signification, especially when used in reference to carriage, means to place together and prepare for transportation, as to make up a bundle or bale, and package is a bundle or bale made up for transportation. It may consist of a single article; but when separate articles are placed together and prepared for transportation in a bundle, or bale, or box, or other receptacle, they do not form as many separate and distinct packages as there are articles, though they may be wrapped ⁵⁶³ separately. The case or box or bale in which separate articles are placed

together for transportation constitutes the 'original package' in the commercial sense."

In the case of *In re Harmon*, 43 Fed. Rep. 372, a case in which Harmon, as agent for one Jordan, a citizen of Tennessee, in Mississippi, received from his principal by express boxes in which were packed bottles or flasks of whisky, some holding a pint and others a quart each. The bottles were each inclosed in a paper wrapper or box, and the wrapper sealed with mucilage or sealing wax, and were placed in pine boxes which were without covers, being furnished by the express company and to be returned to them when empty. The bottles of liquor were kept in the pine boxes until a customer was obtained, when his purchase of one or more bottles was removed therefrom and delivered. Harmon was informed against, arrested under the state law for making such sales of liquor, convicted, and sentenced to pay a fine and to imprisonment in the county jail, and upon being so imprisoned, appealed to the federal court for a writ of habeas corpus, and the court states its conclusion as to what constituted the original package, the pine box or the bottles in the following language: "Where bottles of whisky, each sealed up in a paper wrapper and closely packed together in uncovered wooden boxes furnished by an express company and marked 'to be returned,' are shipped from one state to another, the boxes, and not the bottles, constitute the 'original packages' within the meaning of the decisions of the supreme court upon the interstate commerce provision of the national constitution." To the same effect are *Harrison v. State* (Ala., Nov. 1890), 10 South. Rep. 30; *State v. Chapman*, 1 S. Dak. 414; *Commonwealth v. Swihart*, 138 Pa. St. 629; *Smith v. State*, 54 Ark. 248. To the contrary are the Iowa cases of *State v. Coonan*, 82 Iowa, 400, and *State v. Miller*, 86 Iowa, 638, in which the doctrine announced in *State v. Coonan*, 82 Iowa, 400, was followed. The rule stated in these cases decided by the Iowa court, and the reasoning employed in them upon which the court bases its decisions, are not so satisfactory or conclusive as to induce us to follow them.

We think the cases herein quoted and cited from the federal and state courts, which hold that the box or package in which the importer of the liquors ships them, be it large or small, containing only one bottle or more than one, is the "original package," that the shipper, by his act in making up the package for shipment, determined what it should be,

state the correct rule. If he desired it to consist of only one bottle, he could so have constituted it by shipping in the case at bar one of the flasks covered as it was alone; if he placed a number of them in a pine box, because of his act, the package which was to be transported, when received by his agent, could be sold in its condition when shipped, but if opened, then its several parts, if removed from the box or case, could no longer be considered or sold each as an original package.

It follows that the decision of the district court was right, and its judgment is affirmed.

"ORIGINAL PACKAGE."—The case or box or bale in which separate articles are placed together for transportation constitutes the "original package" in the commercial sense. No single article therein, though separately wrapped, is an original package: *State v. Parsons*, 124 Mo. 436; 46 Am. St. Rep. 457, and note; and this applies to bottles of intoxicating liquor taken out of the boxes in which they were shipped before being exposed for sale: See monographic note to *People v. Wemple*, 27 Am. St. Rep. 554, on the constitutionality of state regulations of interstate commerce.

GREENE v. GREENE.

[42 NEBRASKA, 634.]

HUSBAND AND WIFE AS WITNESSES AGAINST EACH OTHER—SPECIFIC PERFORMANCE.—Under a statute prohibiting a husband and wife from testifying against each other, except in certain criminal proceedings, neither can testify against the other in a suit by him against her to compel the specific performance of her contract to convey to him certain real estate.

STATUTES—REPEAL—MARRIED WOMEN AS WITNESSES.—A statute disabling a married woman from testifying is not repealed by the enactment of a statute entitled "Married Women," but containing no reference to the right of a married woman to testify.

SPECIFIC PERFORMANCE—HUSBAND AND WIFE—WIFE'S CONTRACT.—In a suit by a husband to compel the specific performance of his wife's contract to convey to him certain real estate, specific performance should not be decreed when her defense is that the contract was procured by fraud and duress and undue influence exercised over her by her husband, and the evidence establishes that the contract was executed because of a species of matrimonial coercion and undue influence, though it fails to establish fraud or duress.

SPECIFIC PERFORMANCE—HUSBAND AND WIFE—CONSIDERATION.—A husband cannot compel the specific performance of his wife's contract to convey to him certain real estate if no consideration for such contract is made to appear.

SPECIFIC PERFORMANCE—HUSBAND AND WIFE—WIFE'S CONTRACT—BURDEN OF PROOF.—If a husband claims, in an action by him to compel

specific performance of his wife's contract to convey to him certain real estate, that the consideration for the contract was her love and affection for him, or that she intended because he was her husband to make a gift of the land to him, the burden is upon him to prove that she made the contract freely and voluntarily, with full knowledge of all the facts surrounding it, without any fraud being practiced upon her, and that she was not induced to make it by his coercion or undue influence.

George B. France and N. V. Harlan, for the appellant.

John H. Ames and Sedgwick & Power, for the appellee.

635 RAGAN, C. Robert Blair died in the state of New Jersey about the year 1887, owning the legal title to the south half of the southeast quarter of section 31, in township 11 north, and range 2 west of the sixth parallel meridian, and lot 11, in block 58, in the city of York, in York county, Nebraska. Mr. Blair left a will, in and by which he devised an undivided one-half of this real estate to his daughter, Mrs. Rachel B. Greene, then and now the wife of Charles Greene, and an undivided one-half of said real estate to his two daughters, Mesdames Armstrong and Adams. Charles Greene and Rachael Greene, his wife, at this time resided in the city of York, Nebraska. About the month of May, 1888, Mrs. Greene instituted in the courts of New Jersey proceedings for contesting the will made by her father. The grounds of this contest were that she was the owner of said real estate; that her father had loaned her the money with which to purchase it, and that he held the title thereto in trust for her, the agreement being that the money which he had loaned her and which paid for the real estate was to be charged to her as an advancement made to her by her father 636 out of her share of his estate. About the same time her husband, Charles Greene, brought suit in the district court of York county against the executors of Robert Blair, his daughters, the Mesdames Armstrong and Adams, and his wife, Mrs. Rachel B. Greene. In this suit Charles Greene alleged that he was the owner of the above-described real estate, and that Robert Blair, during his lifetime, held the title thereto in trust for him, the said Charles Greene, and that Robert Blair had loaned him, Greene, the money with which to purchase this real estate, and that he held the title in his, Blair's, name, as security for the money so advanced. On the twenty-fourth day of July, 1888, a compromise and settlement of the will contest was had, and by the terms of this settlement

Mesdames Armstrong and Adams and their husbands quit-claimed to Mrs. Greene all the interest in the above-described real estate which had been devised to them by the will of their father, Robert Blair, and the said will was then admitted to probate. Charles Greene was present at this settlement and consented thereto, and one condition of the settlement made was that Charles Greene should dismiss the suit he had then pending claiming title to this property in York county, Nebraska, and relinquish all his claim of title to said property to his wife, Mrs. Rachel B. Greene. Charles Greene agreed to this settlement, and on the twenty-seventh day of July, 1888, he evidenced his agreement by a writing, duly signed, witnessed, and acknowledged by him, but dated the 24th of July, 1888, and in this writing he agreed to dismiss without delay the suit he had pending in York county, and relinquish all his claim of title to the real estate in favor of his wife. On the same day that he executed this writing, to wit, July 27, 1888, he and his wife, Rachel B. Greene, entered into another contract in writing, duly signed, witnessed, and acknowledged by both of them, in and by which contract Mrs. Greene agreed to convey to her husband the real estate above described, the consideration being that Charles Greene would dismiss the ⁶³⁷ suit brought by him and then pending in York county, Nebraska, against his said wife and the heirs and executors of Robert Blair, deceased. Mrs. Greene having refused to comply with this contract and convey the lands to her husband, he brought this suit for the specific performance of the agreement. The answer of Mrs. Greene to the suit, so far as material here, set out two defenses: (a) That said agreement was procured from her by fraud, duress, and by an undue influence exercised over her by her husband; (b) That Charles Greene was estopped from enforcing this contract by reason of his agreement made on the twenty-fourth day of July, 1888, and evidenced by him in writing on the twenty-seventh day of July, in settlement of the proceedings contesting the will of the said Robert Blair, deceased. The district court found and decreed the issues in favor of Mrs. Greene, and from this decree Mr. Greene appeals.

1. The first argument relied upon here for a reversal of this decree is the refusal of the district court to permit Charles Greene to testify on the trial of the case. Section 331 of the Code of Civil Procedure provides: "The husband can, in no case, be a witness against the wife, nor the wife

against the husband, except in a criminal proceeding for a crime committed by the one against the other, but they may in all criminal prosecutions be witnesses for each other." This provision of our code was under consideration by this court (Ryan, C., writing the opinion) in *Niland v. Kalish*, 37 Neb. 47. The action was brought by the creditors of Solomon Kalish to set aside certain conveyances made to his wife, Adalia Kalish. On the trial the creditors sought to have the husband testify in the case, and also sought to have the wife testify in the case. The district court, however, excluded the testimony, and the creditors appealed, and this court held that neither the husband nor the wife could testify in the case, as, from the nature of the action, the testimony of the husband would be against the interests of his wife and the testimony of the wife be ⁶³⁸ against that of her husband, and the judgment of the district court was affirmed. But it is argued that as by chapter 53 of the Compiled Statutes of 1893, entitled "Married Women," a married woman may bargain, sell, and convey her real estate and enter into contract with reference to the same with like effect as a married man may in relation to his real estate, and that a woman while married may sue and be sued in the same manner as if she were unmarried, that therefore said chapter 53 repealed said section 331 of the Civil Code, and thereby removed the common-law disabilities of a married woman as to testifying. This precise question was before this court in *Skinner v. Skinner*, 38 Neb. 756, and it was there held: "But this act [chapter entitled 'Married Women'] has no reference to the right of married women to testify. It does not define, nor attempt to define, what shall be evidence nor who shall be competent witnesses in any case. It does not deal with the subject of either witnesses or evidence. At common law the contracts of a married woman were void, and the object, and the only object, of this statute [said chapter 53] was to remove her disability to contract and to permit her to contract with reference to her separate property, trade, or business: *Godfrey v. Megahan*, 38 Neb. 748, and cases there cited; *Niland v. Kalish*, 37 Neb. 47. In *Lawson v. Gibson*, 18 Neb. 137, the rule as to the repeal of statutes by implication is thus stated: 'A statute will not be considered repealed by implication unless the repugnancy between the new provision and the former statute is plain and unavoidable.' Now, there is no repugnancy whatever between section 331 of the Code

of Civil Procedure, defining the cases and circumstances in which a husband or wife becomes a competent witness against the other, and the so-called 'Married Woman's Act,' removing the common-law disabilities of a married woman to make contracts and sue and be sued. At common law neither husband nor wife could testify one against the other in any case. The ⁶³⁹ rule still remains, except in so far as it has been changed by our statutes." The district court then did not err in refusing to permit Mr. Greene to testify in this case.

2. A second argument relied upon for a reversal of this decree is that it is not sustained by sufficient competent evidence. The evidence does not establish that the contract made the basis of this suit was obtained from Mrs. Greene by fraud. She was not misled by any false representations of her husband as to the actual facts in the case, as she knew at the time she made the contract that her husband had a suit pending in York county against her and the executors and heirs of Robert Blair, deceased, in which suit he claimed to be the owner of the property in controversy; nor does the evidence establish that Mrs. Greene was induced to make the contract sued upon because of fear of violence or injury to her person at the hands of her husband; but it does establish that Mr. Greene did obtain this contract from his wife by a species of matrimonial coercion, or the exercise of an undue influence over her, resulting from their marriage relations, and this is sufficient to release the wife from the performance of the contract: *Witbeck v. Witbeck*, 25 Mich. 439; *Jenne v. Marble*, 87 Mich. 322. The decree appealed from is right for another reason. Mr. Greene agreed with the executors and heirs of Robert Blair—his wife included among such heirs—to dismiss the suit he had brought in York county claiming this property, and to relinquish his rights and claims to said property to his wife, if they, the other heirs of Robert Blair, would convey their interest to his, Mr. Greene's, wife. Mrs. Greene thus became vested with the entire property instead of one-half of it, as provided by the terms of her father's will, and the contest over the will was thus settled and compromised, and Mr. Greene solemnly agreed, and evidenced the agreement in writing, to dismiss the York county suit and relinquish in favor of his wife all his claims to said property. It is clear that ⁶⁴⁰ if Mr. Greene had not dismissed his suit his agreement made in New Jersey in compromise of the will contest could have

been successfully pleaded against him in bar of his further prosecution of the action. The compromise of the will contest was a sufficient consideration to support Mr. Greene's agreement to dismiss his York county suit and relinquish in favor of his wife all claims he had against the real estate involved therein. So far as the record discloses, this agreement was made by Mr. Greene freely and voluntarily, without any fraud practiced upon him and with a full knowledge of all the facts in the case, and was, therefore, as binding on Mr. Greene as were the agreements of the executors and heirs of Robert Blair, deceased, binding on them: *Prichard v. Sharp*, 51 Mich. 432; *Husband v. Epling*, 81 Ill. 172; 25 Am. Rep. 273. The contract, then, sued on here has for its support no consideration whatever. True, it recites the pendency of the suit brought by Greene in York county, and that he will dismiss such suit in consideration that his wife would convey him the property described therein; but equity regards that done which a party is bound to do, and hence, as matter of law, the York county suit was dismissed at the very time Mr. Greene obtained the contract made the basis of this suit. Mr. Greene's action, then, is a suit against his wife for a specific performance of her contract to convey to him certain lands. The contract is not void because between husband and wife, as a married woman in this state may make valid contracts with her husband in reference to, or upon the faith and credit of, her separate estate: *May v. May*, 9 Neb. 16; 31 Am. Rep. 399; *Skinner v. Skinner*, 38 Neb. 756. But to enable Mr. Greene to enforce the contract in suit the burden was upon him to show that the contract had for its support some consideration. As already stated, the evidence discloses that there was no consideration. If the claim of Mr. Greene was that because of her love and affection for him, or because of the fact that he was her husband, his ⁶⁴¹ wife, by the contract, intended to make him a gift of this land, then the burden was upon Mr. Greene to show that his wife made such contract freely and voluntarily, with a full knowledge of all the facts in reference thereto, without any fraud practiced upon her, and that she did not make such contract by reason of the coercion or undue influence of her husband: *Boyd v. De La Montagnie*, 73 N. Y. 498; 29 Am. Rep. 197. The evidence does not show these facts, and the decree of the district court was, therefore, right and is affirmed.

HUSBAND AND WIFE—WITNESSES.—If a husband and his wife are both interested in the result of a suit, neither is competent as a witness: *De Farges v. Ryland*, 87 Va. 404; 24 Am. St. Rep. 659; and a statute removing the disability of witnesses on the ground of interest does not render the husband and wife competent witnesses, the one for or against the other, even as to matters not confidential: Note to *Johnson v. Boice*, 8 Am. St. Rep. 532.

IN RE VAN SCIEVER.

[42 NEBRASKA, 772.]

EXTRADITION—HABEAS CORPUS—REVIEW OF EVIDENCE.—If a requisition for the return of a fugitive from justice is accompanied by a copy of the information and of the evidence taken before the committing magistrate, and the prisoner, after arrest, is denied a discharge on habeas corpus in the surrendering state, such evidence, on a review of the judgment on habeas corpus by petition in error, cannot be examined to see whether it sustains a charge of crime or a finding by the magistrate that there was probable cause for committing the prisoner.

EXTRADITION—HABEAS CORPUS—EVIDENCE THAT ACT CHARGED IS A CRIME.

A copy of an indictment accompanying a requisition for the extradition of a fugitive from justice is prima facie evidence that the act charged therein is a crime against the laws of the demanding state; and a copy of an information, after a preliminary examination and a holding to answer, is entitled to the same weight as evidence, and will, on habeas corpus proceedings, be so considered.

HABEAS CORPUS—JUDGMENT ON, HOW REVIEWED.—Under the laws of Nebraska a habeas corpus case is in the nature of a civil proceeding, and is reviewable by petition in error as in other cases. Hence, there must be a motion for a new trial, embodying the errors of which complaint is made, and a ruling of the trial court obtained thereon; but, as the right to personal liberty is involved, the rule requiring such a motion will not always be enforced if a reasonable excuse is given for not making the motion.

HABEAS CORPUS—SECTION OF CODE CONSTRUED.—A code section stating that, "until the legislature shall otherwise provide, this code shall not affect proceedings on habeas corpus," etc., applies only to the application for the writ and its hearing, and not to the manner of reviewing the judgment thereon or its removal for such purpose.

Pound & Burr, for the appellant.

Stearns & Strode, for the appellee.

776 HARRISON, J. On October 20, 1894, H. H. Markham, governor of the state of California, issued a requisition, directed to the governor of this state, in which it was stated, in substance, that the plaintiff in error stands charged with the crime of embezzlement committed in the county of Los Angeles, state of California, and has fled from justice and

taken refuge in the state of Nebraska, and requested and demanded that he be apprehended and delivered to a party named, to be conveyed to the state of California to be dealt with according to law. With the requisition were an affidavit, a copy of a complaint, or information, filed in the superior court of the county of Los Angeles, purporting to charge plaintiff in error with the crime of embezzlement, and copies of other papers, from which it appears that he had been arrested in the state of California and taken before a magistrate and given a preliminary examination, and in due course of the proceedings the information filed in the superior court, to which, upon arraignment, he had entered a plea of not guilty, and pending trial been admitted to bail. His excellency, Governor Crounse, issued his warrant for the apprehension of plaintiff in error, who was arrested, after which he filed a petition in the district court of Lancaster county and sued out a writ of habeas corpus, under which he was produced before the court, or one of the judges thereof, and a hearing had, which resulted in a finding that he was not unlawfully detained or restrained of his liberty, and after an application to be admitted to bail, which was refused, error has been prosecuted in his behalf to this court.

The first point argued by counsel for plaintiff in error ⁷⁷⁷ in his behalf is that the testimony introduced in the preliminary examination in the magistrate's court in California is attached to the papers accompanying the requisition of the governor of that state, and that a consideration of the testimony will convince that the plaintiff in error has not committed the crime with which it is claimed he is charged in the information. We think it is without our province in this, a proceeding in error to review the action of the district court in the habeas corpus case, to enter into an examination of this evidence with a view to determining the question of whether the plaintiff in error should have been charged with a crime, the answer to such question to depend upon a decision of the sufficiency or insufficiency of the testimony to sustain the charge, and we cannot agree with counsel that inasmuch as this evidence is sent with and attached to the governor's requisition, it becomes our duty to examine it for the purpose of ascertaining whether the plaintiff in error stands charged with a crime. It would, in effect, be a review of the action of the justice of the peace in California, in holding from this testimony that a crime had been committed and

there was probable cause for believing that plaintiff in error committed it. This would be passing back beyond the superior court in which information has been filed against him, and reviewing the case as made upon the evidence in the court of the examining magistrate. We are convinced that this cannot be done.

Another and the main point insisted upon by counsel for plaintiff in error is that the information is insufficient in that it does not state a crime, and as a portion of the argument on this point it is claimed that inasmuch as the law of California relating to embezzlement was not introduced in evidence on the hearing of the habeas corpus, and that in order to be considered it must have been proved as any other fact, or in the absence of such proof the court must presume that the law of California in regard to the ⁷⁷⁸ crime charged is the same as the law of this state, and if the complaint is insufficient under the provisions of our Criminal Code in relation to embezzlement, the plaintiff in error is entitled to be discharged under the habeas corpus. In Hawley on Interstate Extradition, 29, 30, is the following statement in reference to the rule that courts of one state do not take judicial notice of the laws of another state: "One of the difficulties which is found in determining whether or not the act charged is a crime in the demanding state, and what evidence of this shall be deemed conclusive, grows out of the rule that the courts of one state cannot take judicial knowledge of the laws of another state. They must be proved before them as matters of fact. It is not too much to say that it is a foolish rule, more honored in the breach than in the observance; and many cases can now be found in the books in which no pretense is made of observing it. But there are other cases in which the highest courts have obstinately shut their eyes to the most indubitable evidence of the law in another state." The law of California on the subject of embezzlement, it is claimed by counsel for defendant in error, was used or read during the hearing in the district court, and the attempt was made to incorporate it in the bill of exceptions as an amendment thereto, but it was refused by the judge who heard the case, and no doubt correctly; but which rule shall prevail in reference to our taking judicial notice of the law of the state of California or requiring it to be proved as a fact we think can have no influence or weight in shaping our decision in this case. The record discloses that the plaintiff in error has been

given a preliminary examination, and held for appearance to answer in the higher court; that an information has been filed in such higher court, and that on being arraigned plaintiff in error entered a plea of not guilty, and was admitted to bail pending trial. Prosecution by information in states by which it has been adopted is substituted for an inquiry by a grand jury⁷⁷⁹ and its return of an indictment, and it is guarded by the requirement that every person prosecuted under an information must first have been allowed a preliminary examination, and the further provision that the public prosecutor shall examine into the matter, and if he concludes that a further prosecution should be had, he shall prepare the information and file it. This, we think, constitutes the information filed in the higher court a criminal pleading of as high a grade and entitled to as much credence as an indictment. Having reached this conclusion, then, the following rule of law, as stated by the author in *Hawley on Interstate Extradition*, 30, is applicable: "The fact that an indictment has been found is regarded as affording at least prima facie evidence that the act charged is a crime"; and the same author further says, on pages 32 and 33 of his work: "The distinction between an affidavit and an indictment in one case is stated as follows: 'If the charge is by way of affidavit against the alleged fugitive, and it appears clearly from the whole facts stated in the affidavit taken together that no crime had been committed, it might, with some show of reason, be claimed that the subject matter was not within the provisions of the constitution and act of Congress, and therefore, as to the jurisdiction of the executive to issue the warrant, the whole matter would be *coram non judice*. The case in 1 Parker's Criminal Cases, 429, is of this character; but that is far from being this case. Here the charge against the alleged fugitive is by a bill of indictment found by a grand jury, and whether the bill charges an indictable offense under the statute of Illinois should be left to the determination of the courts of that state': *In re Greenough*, 31 Vt. 279. While the rule seems to be that the making of an affidavit and the issuing of a warrant by a magistrate is not evidence that the act charged is a crime, all of the authorities agree that the finding of an indictment is at least prima facie evidence that the act⁷⁸⁰ charged amounts to a crime" (*In re Briscoe*, 51 How. Pr. 422); and the supreme court of Maine, in an opinion given to the governor, said: "In our opinion it is the

duty of the executive of this state to cause to be delivered over to the agent of another state, at the request of the executive thereof, a citizen of their state charged by indictment with the fraud before set forth, which, being indicted in such state, may be presumed to be there regarded as a crime: 6 Am. Jur. 226"; Hurd on Habeas Corpus, 608, 609, and cases cited and commented upon; *Ex parte Pearce*, 32 Tex. Crim. Rep. 301; *In re Brown*, 112 Mass. 409; 17 Am. Rep. 114. In 2 Moore on Extradition, section 638, page 1030, it is stated: "It is believed that there is no case in which a court has on habeas corpus discharged a fugitive from custody on a rendition warrant on the ground that an indictment accompanying the requisition did not constitute or contain a sufficient charge of crime." That the technical sufficiency of the pleading will not be examined on habeas corpus, but will be left to be disposed of by the courts of the state making the demand for the return of the party accused, see *Tullis v. Fleming*, 69 Ind. 15; *Ex parte Pearce*, 32 Tex. Crim. Rep. 301; *State v. O'Connor*, 38 Minn. 243; *In re Brown*, 112 Mass. 409; 17 Am. Rep. 114; *In re Roberts*, 24 Fed. Rep. 132; *In re Welch*, 57 Fed. Rep. 576; *Roberts v. Reilly*, 116 U. S. 80. We conclude that the information in this case must be considered prima facie evidence of a crime charged against the plaintiff in error under the laws of California.

It is argued by counsel for defendant in error in this case that no motion for new trial having been filed in the district court, the plaintiff in error could not have the case reviewed in this court by petition in error. The authorities all state that it is the established rule of the English courts that a writ of error will not lie to the final order made on the hearing of a habeas corpus, and so it is held in a number of the states of our country, while several of them have provided by statute for reviewing the decision ⁷⁸¹ on a habeas corpus by error or appeal. In our state the right to review by error proceedings exists: See *Atwood v. Atwater*, 34 Neb. 405, and authorities cited, among which is *Ex parte Wames*, Nebraska supreme court, not reported. See, also, *In re White*, 33 Neb. 812. But returning to the question of whether it was necessary to file a motion for a new trial in order to obtain a review of any alleged error occurring during the trial, section 375 of the Criminal Code—the one by the provisions of which the plaintiff in error claims a right to proceed in this court—states: "The proceedings

upon any writ of habeas corpus shall be recorded by the clerks and judges respectively, and may be reviewed, and writs of error and certiorari may issue as in other cases now provided by law." But writs of error and certiorari have been abolished in civil cases. In section 599 of the Code of Civil Procedure it is stated: "Writs of error and certiorari to reverse, vacate, or modify judgments or final orders in civil cases are abolished." The application for a writ of habeas corpus, we think, may be said to be sufficiently of the character of a civil proceeding to be governed by the provision of the section as quoted. In *Ex parte Collier*, 6 Ohio St. 60, a proceeding in the supreme court to reverse an order made by a judge of the court of common pleas in a habeas corpus case, the court stated: "We regard this in the nature of a civil proceeding." But in section 902 of our Civil Code we find the following: "Until the legislature shall otherwise provide, this code shall not affect proceedings on habeas corpus," etc. It may be argued that by this portion of section 902 all the rights and remedies given in what is known as the "Habeas Corpus Act" are saved, and not within the operation of the section by which writs of error and certiorari were abolished. In considering this question under provisions of statute similarly worded and phrased, the supreme court of Ohio, in *Ex parte Collier*, 6 Ohio St. 60, stated: ⁷⁸³ "Section 604 of the code enacts 'that until the legislature shall otherwise provide, this code shall not affect proceedings on habeas corpus,' etc. It may be claimed that this clause, by its peculiar phraseology, saves the habeas corpus act, and all of the remedies given by it, from the operations of the code. The word 'proceedings' includes, we think, nothing more than the doings of the judge who allows the writ, and is limited to the hearing before him. The filing of a petition in error is a proceeding before another tribunal. It is new in its character, and effects a review of the decision of the judge, without forming any part of the case before him. The allowance of the writ, the bringing forward of the petitioner before the judge, the inquiry into the cause of his capture and detention, the introduction of evidence, and the liberation or other disposal of the relator, are all to be governed by the act relating thereto; and as to other questions, to be determined by some other tribunal, though arising out of the case made on the writ, the code prescribes the form by which they are to be governed. We adopt this construction the more will-

ingly as it secures uniformity of practice in cases of error in civil proceedings, which seems to be a prominent object of the code." We think the views expressed and doctrine announced by the Ohio court, as above set forth, sound and correct, and hence we adopt them, and this not only wherein it refers to the application of the portion of the section quoted and limits it to the manner of procedure in the allowance of and hearing on the writ, but also in the further statement that "as to other questions to be determined by some other tribunal, though arising out of the case made on the writ, the code prescribes the form by which they are to be governed." This court in *In re White*, 33 Neb. 812, said in the opinion written by Maxwell, C. J.: "There is an abundant provision for the granting of the writ, as it may be applied for to any county judge or judge of the district court, and the several rulings thereon of the ⁷⁸³ district court may be brought into this court for review on error. As a general rule, therefore, the proceeding should be instituted in the county where the alleged unlawful restraint is being exercised, and where, if it is necessary to call witnesses, the parties will not be subjected to unnecessary expense and inconvenience. The case may then be reviewed on error as in other cases." From the above statement we think it may be concluded that the court contemplated that proceedings in error in a habeas corpus case would be governed by the rules prevailing in other cases, and we are satisfied that where there is a trial in a habeas corpus case, and it is sought to have reviewed any error alleged to have occurred during such trial, the same rule applies in a habeas corpus case as in other cases, and it is necessary that a motion for a new trial should be made, embodying the errors of which the party complains, and presented to the trial court or judge and a ruling obtained thereon. In the case at bar there was no motion for a new trial, and if the rule requiring such motion had been enforced, we need not have examined some of the questions which have been considered; but counsel for plaintiff in error states in his reply brief as a reason why a motion for a new trial was not filed, that they did not have sufficient time allowed them to do so. Whether this was the reason or not does not in any manner appear from the record; but, inasmuch as the final decision of the questions raised by the petition in error involved the right of the plaintiff in error to his personal liberty, for a time at least, the right to personal liberty being

one than which we know no greater, we have thought it best to examine, consider, and decide them.

From the views expressed it follows that the decision of the district court will be and is affirmed.

EXTRADITION—HABEAS CORPUS.—In habeas corpus proceedings in extradition cases the merits cannot be considered. The only subjects of inquiry are the sufficiency of the papers and the identity of the prisoner: *Kurtz v. State*, 22 Fla. 36; 1 Am. St. Rep. 173. While there must be a proper charge of crime, the courts will not, on habeas corpus, investigate the guilt or innocence of the prisoner. If the copy of the indictment accompanying a requisition contains a charge of crime, the tribunals of the state in which the criminal is found will not consider or pass upon the sufficiency of the indictment as a matter of technical pleading. Whether it charges a crime must be left to the courts of the demanding state: See monographic note to *Matter of Fetter*, 57 Am. Dec. 395, 397, on proceedings for the arrest and surrender in one state of fugitives from justice in another.

WORLD PUBLISHING COMPANY v. MULLEN.

[43 NEBRASKA, 126.]

LIBEL—PLEADING.—A complaint averring that defendant published a statement to the effect that plaintiff had brought two actions upon certain policies of insurance, that there were a number of suspicious circumstances at the time of the loss, and it was reported that the plaintiff had fired his building, and that, as a result of the investigation, the insurer had refused to pay the loss, and his agent says he has sufficient ground for contesting the loss, but refuses to state what facts are in his possession in regard to the plaintiff's complicity, discloses the publication of matter libelous per se, without the aid of colloquium or innuendo or any allegation of special damages.

LIBEL—CONSTRUCTION OF WORDS.—In determining whether the words of a publication are libelous, the court will not resort to any technical construction of the language used, but the court and the jury will read the words, as they would read them elsewhere, in their ordinary and popular sense. Courts no longer strain to find an innocent meaning for words prima facie defamatory, nor do they put a forced construction upon words which might fairly be deemed harmless.

LIBEL—DEFINITION.—Any printed or written statement which falsely and maliciously charges another with the commission of a crime is libelous per se.

LIBEL—PUBLISHING WORDS ATTRIBUTED TO ANOTHER.—A newspaper publishing a report as coming from another person is answerable therefor if such report is false and libelous.

LIBEL.—A CHARGE OF A CRIME TO BE LIBELOUS NEED not be expressed in the technical language essential to a good indictment, if the obvious meaning of the words employed is to impute to a person the commission of a crime or to subject him to public ignominy or disgrace.

Morris & Beekman and Gurley & Marple, for the plaintiff in error.

Mahoney, Minahan & Smyth, contra.

128 RAGAN, C. John S. Mullen brought this, a suit for libel, in the district court of Douglas county against the World Publishing Company, a corporation engaged in the publication of a newspaper in the city of Omaha, and hereinafter called the "publishing company." There was a trial to a jury, with a verdict and judgment for Mullen, and the publishing company brings the case here for review. The evidence has not been preserved by a bill of exceptions, and there was no motion in the court below for a new trial. After the jury had returned its verdict counsel for the publishing company moved the court for judgment upon the pleadings, notwithstanding the verdict, upon the ground that the petition of Mullen did not state a cause of action. This motion the district court overruled, and its ruling on this motion is the only assignment of error argued here.

The article printed by the publishing company alleged by Mullen to be libelous, and on which he bases his suit, is in words and figures as follows:

"MULLEN'S INSURANCE.

"The Company Declines to Pay the Risk of His Building.

"John S. Mullen is the plaintiff in two suits in the county court against the German Fire Insurance Company **129** of Peoria, Illinois. The suits are to recover the value of two insurance policies which Mullen held on his saloon and store in Albright, which were destroyed by fire August 31, 1890. There were a number of suspicious circumstances at the time, and it was reported that Mullen fired the buildings himself. The agent of the insurance company investigated the matter, and as a result the company refused to pay the insurance, which amounts to \$1,900, on both policies. Mullen now brings suit, and it will be contested by the company. Its agent said it had excellent grounds for contesting the case, but refused to state what facts they were in possession of in regard to Mullen's complicity."

Mullen alleged no special damages in his petition, and it contains no colloquium or innuendo, and the argument of the publishing company is that the petition does not state a cause of action, as the language is not libelous per se. Counsel for the publishing company well say: "The courts

no longer strain to find an innocent meaning for words prima facie defamatory, neither will they put a forced construction on words which may fairly be deemed harmless." Any written or printed statement which falsely and maliciously charges another with the commission of a crime is libelous per se; and in determining whether the words of a publication are libelous the courts will not resort to any technical construction of the language used, but the court and the jury will read the words in court as they would read them elsewhere. Language alleged to be libelous is to be construed in its ordinary and popular sense, and the question is whether the language, when so construed, conveys, or is calculated to convey, to persons reading it the charge of a crime: *Pokrok Zapadu Pub. Co. v. Zizkovsky*, 42 Neb. 64. The question here then is, What is the plain import, the ordinary meaning, of the language of the article published? What would ordinary men of ordinary common sense understand from reading this article? That Mullen owned a saloon and store in Albright; that ¹⁸⁹⁰ it was insured against loss or damage from fire in the sum of nineteen hundred dollars by the German Fire Insurance Company of Peoria, Illinois; that the property was destroyed by fire on August 31, 1890; that there were a number of suspicious circumstances surrounding the destruction of the insured property which caused the insurance company to refuse to pay the loss; that the insurance company at least suspected Mullen of burning the property himself, or being an accomplice therein; and that it was reported—some person or persons had said—that Mullen had burned the insured property. In *Rosewater v. Hoffman*, 24 Neb. 222, Rosewater caused to be published in a newspaper a letter in which he stated that a friend of his had told him that "he [Hoffman] once served me a very scurvy trick. He borrowed my horse and saddle some years ago, and rode off and sold the property. He was arrested near Springfield, Missouri, and lodged in jail. The sheriff telegraphed me that he had him in charge, but I finally concluded I would not prosecute him. He was then released. If you write down there you will get other particulars." This language was held by this court to be libelous per se because it charged Hoffman with having committed the crime of larceny. It is to be observed that Rosewater in the article did not himself charge Hoffman with having stolen the horse, but that his, Rosewater's, friend had told him, Rosewater, that

Hoffman had borrowed the horse, and rode it off, and sold it. In the case at bar the publishing company did not make the direct charge that Mullen had burned his insured property, but the publishing company in effect states that some one had reported to it, the publishing company, that Mullen had burned his insured property. The publishing company should, therefore, be held responsible as if it had charged directly that Mullen committed the crime of arson under section 57 of our Criminal Code. Counsel for the publishing company insist that Mullen, in order to have been guilty of arson under ¹³¹ the statute, must have willfully and maliciously set fire to his insured property, with the intent to obtain the insurance money; and that there is nothing in the language of the article published that charges Mullen with intentionally, unlawfully, willfully, or maliciously setting fire to the insured property, and that, therefore, the language of the publication is not libelous per se. To hold that the language of this article is not libelous because it does not contain words necessary to the framing of a good indictment against Mullen for arson would be, in effect, to give one construction to language out of court and another in court. A publication, to be libelous per se because charging another with the commission of a crime, does not need to contain the technical statutory language and phrases essential to a good indictment for the crime charged. In support of their contention that the language of this publication is not libelous per se, counsel cite us to the case of *Geisler v. Brown*, 6 Neb. 254. The publication in that case was: "Last night Mrs. Geisler beat her little stepdaughter most unmercifully with a club as large as a man's wrist, striking her over the head, and making the blood flow freely." It was held that this language was not libelous per se. But this case can no longer be regarded as authority, and was, in effect, though not expressly, overruled in *Finch v. Vifquain*, 11 Neb. 280. In the latter case Finch was grand worthy chief templar of a temperance organization of this state, and also secretary of the State Temperance Alliance. Vifquain published an article in a newspaper, in which he said of Finch that he was "a seducer of innocent girls, . . . an arch hypocrite and scoundrel, who was simply using his talents for money-making purposes, and not through any sincerity in the cause in which he is laboring"; and the court held, and we think correctly, that the language was libelous per se. The rule is, that any

language the nature and obvious meaning of which is to impute to a person the commission of a crime, ¹²² or to subject him to public ridicule, ignominy, or disgrace, is actionable of itself.

The petition states a cause of action, and the judgment of the district court is affirmed.

IRVINE, C., not sitting. —

LIBEL—CONSTRUCTION OF WORDS.—In construing a publication alleged to be libelous, the whole article is to be read together, and such construction put upon the language used as would naturally be given it: *St. James etc. Academy v. Guiser*, 125 Mo. 517; 46 Am. St. Rep. 502. Words are to be understood in their plain and ordinary import in actions of libel: *Adams v. Lawson*, 17 Gratt. 250; 94 Am. Dec. 455; *Edwards v. San Jose Printing Soc.*, 99 Cal. 431; 37 Am. St. Rep. 70, and note.

LIBEL—CHARGING CRIME.—Words which impute guilt of crime punishable with imprisonment are libelous per se: *Belo v. Fuller*, 84 Tex. 450; 31 Am. St. Rep. 75, and note; *Conroy v. Pittsburgh Times*, 139 Pa. St. 334; 23 Am. St. Rep. 188. See the extended notes to *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 339, and *Terwiliger v. Wands*, 72 Am. Dec. 426.

LIBEL—PUBLICATION OF WORDS OF ANOTHER.—The fact that a libelous card or advertisement was written by a person other than the publisher will not exonerate the latter from liability: *Riley v. Lee*, 88 Ky. 603; 21 Am. St. Rep. 358. See, further, the extended note to *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 334.

BUTLER v. FITZGERALD.

[43 NEBRASKA, 192.]

DOWER.—AN EXECUTION SALE against a husband, though followed by a judicial confirmation and a conveyance, does not extinguish the wife's right of dower.

DOWER—DEFINITION.—Tenant in dower is where the husband of a woman is seised of an estate of inheritance and dies. In this case the wife shall have one-third part of the lands and tenements whereof he was seised at any time during the coverture, to hold for herself for the term of her natural life.

DOWER ARISES SOLELY BY THE OPERATION OF LAW, and not by force of any contract between the parties, express or implied.

DOWER RIGHT ONCE ATTACHED CONTINUES a charge or encumbrance upon the real estate, unless released by the voluntary act of the wife or extinguished by operation of law. It is not in the power of the husband alone to defeat it by any conveyance, whether voluntary or involuntary.

JUDICIAL SALES.—THE RULE OF CAVEAT EMPTOR applies to judicial sales, and a conveyance made to a purchaser thereat has no greater effect

and transmits no greater estate than a quitclaim deed from the judgment debtor.

DOWER—VALUE OF AT WHAT TIME TO BE COMPUTED.—If a husband voluntarily alienates lands in which his wife has a right of dower, and their value is afterward enhanced by improvements, the wife shall not have dower except according to the value of the land while held by her husband.

ALIENATION IS AN ACT whereby one man transfers the property and possession of lands, tenements, and other things to another.

DOWER—VALUE OF WHERE LANDS HAVE BEEN SOLD UNDER EXECUTION.—If lands subject to a wife's right of dower are sold under execution against her husband, and she, after his death, seeks to have dower therein assigned, and the value of the lands at his death is greater than at the time of the execution sale, the latter value alone must be considered in assigning dower if its enhancement is the result of improvements made upon the land.

DOWER.—INCREASE IN VALUE OF LAND AFTER ALIENATION arising from circumstances unconnected with improvements may be shared by the wife, and in assigning dower to her the value of such lands at the death of the husband is to be considered as the basis of the assignment, except in so far as the enhancement in value after the conveyance resulted from improvements made by the husband's alienees.

Marquett, Dewees & Hall, and Abbott, Selleck & Lane, for the appellants.

Stewart & Munger and Leese & Starling, contra.

195 RAGAN, C. It appears from a stipulation of the parties to this suit in the record that the material facts in this case are that Lydia Butler and David Butler were husband and wife, and resided as such in this state from the year 1866 until David Butler's death, in May, 1891, and that Lydia Butler still resides in this state; that on the 6th of October, 1879, David Butler was the owner in fee simple of certain real estate, which on said day was levied upon by an execution issued on a judgment obtained against David Butler alone, and sold to satisfy such judgment; that John Fitzgerald became the purchaser of said real estate at said execution sale, and said sale was followed by a judicial confirmation and conveyance to him of said real estate. Lydia Butler brought this suit in the district court of Lancaster county against John Fitzgerald and others to recover her dower in said real estate which had been sold and conveyed under execution as aforesaid. She had judgment, and John Fitzgerald and others interested in said real estate have appealed.

196 The stipulation of facts referred to, and on which the case was tried in the court below, provides that if the court shall find that Lydia Butler was entitled to dower in said

real estate, the court shall ascertain the value of such dower interest and render judgment therefor in her favor; that said Lydia Butler agrees to accept a gross sum of money in lieu of said dower. The two important questions presented by this appeal are:

1. Does the sale of the real estate of a husband under execution on a judgment against him alone, followed by judicial confirmation and conveyance, extinguish the dower interest of the widow of said husband in said real estate? Blackstone defines "dower" at common law thus: "Tenant in dower is where the husband of a woman is seised of an estate of inheritance and dies; in this case the wife shall have a third part of all the lands and tenements whereof he was seised at any time during the coverture, to hold to herself for the term of her natural life"; and he further says that the object of the common law in giving a widow dower in the estate of her husband was to provide "for the sustenance of the widow and for the nurture and education of the younger children": 1 Cooley's Blackstone, bk. 2, pp. 128, 129. Section 1 of chapter 23 of the Compiled Statutes of 1893 provides: "The widow of every deceased person shall be entitled to dower, or the use, during her natural life, of one-third part of all the lands whereof her husband was seised, of all [an] estate of inheritance at any time during the marriage, unless she is lawfully barred thereof." It will be seen that our statute in the matter of a widow's dower follows the rule of the common law, or, more properly speaking, the statute is but declaratory of the common law. In 2 Scribner on Dower, section 2, page 2, it is said: "It will be observed that this estate [dower] arises solely by operation of law and not by force of any contract, expressed or implied, between the parties; it is the silent effect of the relation entered into by them, not as in itself incidental ¹⁹⁷ to that relation or as implied by the marriage contract, but merely as that contract calls into operation the positive institutions of the municipal law." And it was expressly held in *Shearer v. Ranger*, 22 Pick. 447, that "an inchoate right of dower is an existing encumbrance on land within the meaning of the covenant against encumbrances." However this may be, it is clear that when a lawful marriage of a man and woman and the ownership of real estate by the former concur, an inchoate dower right attaches in the nature of a charge or encumbrance upon the real estate of the hus-

band. Under certain conditions, unnecessary to notice here, the dower right may never attach, but when it has once attached, it remains and continues a charge or encumbrance upon the real estate, unless released by the voluntary act of the wife or extinguished by operation of law; and is consummate upon the death of the husband, and in certain other contingencies, not involved in this case, provided for by section 23 of chapter 25 of the statutes, entitled "Divorce and Alimony." In this case none of the conditions existed which prevented the inchoate dower right of Lydia Butler from attaching to the real estate of her husband owned by him at the time of his marriage to her or acquired by him thereafter. The husband is dead, and we now proceed to inquire whether his widow, within the meaning of section 1, chapter 23, quoted above, has been or is "lawfully barred" of a dower interest in the real estate in controversy. The rule of the common law as to the effect of a husband's acts during the coverture on the dower interest of his wife in his real estate is thus stated in 1 Scribner on Dower, section 1, page 603: "After the right of dower has once attached it is not in the power of the husband alone to defeat it by any act in the nature of an alienation or charge. It is a right attaching in law, which, although it may possibly never become absolute (as if the wife died in the lifetime of the husband), yet, from the moment that the facts of marriage and seisin concur, it is so fixed on the land as ¹⁹⁸ to become a title paramount to that of any person claiming under the husband by subsequent act. The alienation of the husband, therefore, whether voluntary, as by deed or will, or involuntary, as by bankruptcy or otherwise, will confer no title on the alienee as against the wife in respect of her dower, but she will be entitled to recover against such alienee (except as to damages), in the same manner as she would have recovered against the heir of the husband had the latter died seised." In the case at bar the real estate in controversy was not aliened by the husband, as that phrase is ordinarily understood. He was deprived of the title to this real estate involuntarily; and we may presume that the only act of his which led to his being deprived of this real estate by the law was his voluntarily contracting the debt made the basis of the judgment, under which the real estate was sold. The decisions of the courts of last resort of the states in construing statutes like our own, and the decisions of the courts of last resort of the states

whose statutes do not define dower, but follow the common-law rule, sustain the proposition quoted above from Scribner, as to the inability of a husband by any voluntary act of his to bar his wife's right of dower to his real estate, after such right has once attached, either directly or indirectly. In *Pifer v. Ward*, 8 Blackf. 252, it was held that "if a mechanic's lien accrue after the employer's marriage, and the employer die after the accruing of the lien, the right of dower of the employer's widow will be paramount to the lien"; and in *Bishop v. Boyle*, 9 Ind. 169, 68 Am. Dec. 615, it was held that "the widow's right of dower extends to and includes a house erected on lands of her husband, and her claim is superior to a mechanic's lien for which the property was sold under a decree against the husband to enforce the lien." The court said: "The wife's dower is a favorite of the law, not resting in contract or resulting from the marriage relation. Hers is the elder lien. The mechanic bestows his labor with a knowledge ¹⁹⁹ of her prior right to the real estate, and he knows that the house he is building, as brick is added to brick and nail after nail is driven, becomes real estate. He can protect himself by security or not venture. She is passive and can do nothing. It is for this reason that she is declared to be a favorite of the law": See, also, *Mark v. Murphy*, 76 Ind. 534. In *Shaeffer v. Weed*, 8 Gilm. 511, it was held that "a widow's dower cannot be affected by the lien created by the statute for the benefit of mechanics, etc., but she is entitled to dower in all the real estate of which her husband was seised during coverture, unless she has released it in the form prescribed by law." In *Gove v. Cather*, 23 Ill. 634, 76 Am. Dec. 711, it was held that the enforcement of a mechanic's lien for improvements made by the husband in his lifetime will not cut off his wife's right of dower even to the extent of the value of such improvements: See, also, *Dingman v. Dingman*, 39 Ohio St. 172. In *Grady v. McCorkle*, 75 Mo. 172, 17 Am. Rep. 676, William Grady owned certain lands, and agreed with his son Leonard that if the latter would go on the lands and improve them he would convey the same to him by way of advancement and charge him with their value. Leonard took possession of the lands and made improvements on them and occupied the lands until his death. William Grady died not having conveyed the lands to Leonard. The widow and heirs of Leonard Grady brought a suit against the widow and heirs of William Grady

for specific performance of William Grady's contract, and the court decreed a specific performance of the contract. The widow of William Grady was a party to this suit and served with process, but made no appearance. After this the widow of William Grady brought suit for her dower interest in the lands, and the court held: "The alienation of real estate by the husband, whether voluntary, as by deed or will, or involuntary, as by proceedings against him, or otherwise, will confer no title on the alienee as against the wife in respect to her dower"; and that the suit ²⁰⁰ for specific performance of the contract made by the widow's husband and the decree enforcing such contract did not bar the widow's dower rights, as they were not drawn in question in the specific performance suit; that the decree in that case had the same effect, and no more, than a deed would have had executed by William Grady alone at the time the decree was rendered had he then been living. Section 64 of chapter 46 of the General Statutes of 1878 of the state of Minnesota provides that a surviving husband or wife shall be entitled to, and shall hold in fee simple, an undivided one-third of all lands of which the deceased was at any time during the marriage seised or possessed. A wife owned certain real estate. A judgment was obtained against the wife and her lands levied upon and sold to satisfy the judgment. The wife then died, and the husband brought suit against the purchasers of the real estate at the execution sale to recover his rights in said real estate. And in *Dayton v. Corser*, 51 Minn. 406, the supreme court of Minnesota held that "the inchoate contingent interest of a husband or wife in real estate owned by the other fixed [by the statute just quoted], and commonly called the 'dower right,' is not divested by a transfer of title from the owner of the property to a purchaser at an execution sale founded upon a judgment against such owner." The court said: "It hardly seems necessary to cite authorities to the proposition that at common law a wife could not be deprived of her dower rights in the real estate of her husband through a sale upon execution under a judgment obtained against him subsequently to the marriage": See, also, *Barker v. Parker*, 17 Mass. 564. It is to be remembered that the language of our statute is, that the widow shall have dower in all the real estate of which her husband was seised during the marriage, "unless she is lawfully barred thereof." Keeping in view the nature of a dower interest as defined

by the common law, and the reason and spirit of the common law on the subject, and the authorities just ²⁰¹ cited, we would feel safe in saying that the dower rights of the appellee in this case were not extinguished or barred by the sale on execution of her husband's real estate during his life on a judgment rendered against him. But our statute has not remitted the courts for guidance entirely to the common law and common-law decisions in respect of dower for determining in what manner a wife or widow may be lawfully barred of her dower rights. Sections 12, 13, and 15 of chapter 23 of the Compiled Statutes of 1893 provide in what manner a married woman may bar her dower rights in the real estate of her husband. Substantially, these provisions provide that a married woman shall be deemed to have released or waived her rights to dower in her husband's real estate only by her voluntary act or contract; and section 43 of chapter 73 of the Compiled Statutes of 1893 provides that a married woman, "to convey her right of dower, she must execute a deed with or without her husband"; and section 7 of said chapter 23 provides that "when a widow shall be entitled to dower out of any lands which shall have been aliened by the husband in his lifetime, . . . such lands shall be estimated in setting out the widow's dower according to their value at the time when they were so aliened." This statute is of itself a legislative recognition of the inability of a husband to deprive his wife of her dower rights in his real estate by a direct or indirect alienation thereof. And section 477 of the Code of Civil Procedure provides that judgments shall be a lien upon the lands of a debtor; and section 491 a of the code provides that when an execution shall be levied upon real estate, the sheriff shall cause the interest of the execution debtor in such real estate to be appraised at its real value; and by sections 499 and 500 of the code it is provided, in substance, that the sale of a debtor's real estate on execution, and the conveyance of such real estate to the purchaser thereof at such sale, shall vest in such purchaser the interest which the execution ²⁰² debtor had in said real estate at the time the judgment under which it was sold became a lien thereon. In the case at bar, David Butler had the title to the real estate in controversy at and before the time it was sold on execution, but that title was encumbered or burdened with the inchoate dower interest of his wife, the appellee, and when the judgment was rendered against David

Butler it became a lien upon the interest of David Butler in said real estate, but that lien was subject to the inchoate dower interest of the wife therein. When this real estate was sold and the sale confirmed, and the sheriff executed a deed in pursuance thereof, he conveyed to Fitzgerald all the interest that David Butler had in this real estate, and such purchaser took the title to this real estate charged with the same burdens and encumbrances thereon that it was charged with while the title rested in David Butler, the wife's inchoate dower right. The rule of caveat emptor applies to a purchaser of real estate at a judicial sale thereof on execution, and the conveyance made to such a purchaser by the sheriff has no greater effect, and conveys no greater estate, than would a quitclaim deed for the premises executed by the execution debtor: *Norton v. Nebraska Loan & Trust Co.*, 85 Neb. 466; 37 Am. St. Rep. 441; *Hamilton v. Southern Nevada etc. Min. Co.*, 33 Fed. Rep. 562. What the law does not permit a husband to do directly he may not do by indirection; and as we have seen it was not in the power of David Butler, by voluntarily alienating his real estate during his marriage, to deprive his wife of her dower rights therein, it logically follows that the sale of David Butler's real estate on execution on a judgment rendered against him alone did not bar or extinguish the dower right of his wife or widow therein; and it is immaterial whether the debt on which such judgment was rendered was contracted voluntarily or otherwise by the husband. We accordingly hold and decide that the sale of the real estate of a husband under execution on a judgment against him alone, followed ²⁰³ by judicial confirmation and conveyance, does not extinguish the inchoate dower of the wife in such real estate; and that upon the death of the husband the widow is entitled to have her dower assigned out of such real estate.

2. The second question is, in estimating the value of the real estate in controversy for the purpose of assigning the widow her dower therein, whether its value at the date of the judicial conveyance made thereof in pursuance of its sale on execution, or its value at the date of the husband's death, shall be adopted. At common law the rule was, if a husband died seised of real estate, in estimating its value for assigning his widow dower therein its value at the date of the assignment of dower was adopted: 2 Scribner on Dower, sec. 30, p. 595. The present English rule is that, where the title

to real estate is in an alienee of the husband, in estimating the value of such real estate for the purpose of assigning the husband's widow dower therein, the value of the real estate at the time of the husband's death is taken; and if improvements have taken place between the time of the husband's death and the time of the assignment of dower, then the value must be taken at the date of the assignment. The common-law rule for estimating the value of real estate out of which dower is to be assigned to a widow, the title to which real estate is at the time in an alienee or a grantee of an alienee of the husband, is stated in some old English cases found in 2 Scribner on Dower, 605, as follows: "If a man be seised of land in fee, and take a wife, and enfeof a stranger of the land, and the feoffee builds thereupon a castle or mansion house, or other buildings, or otherwise improves it, so that it is worth more by the year than when it was in the possession of the husband, the wife shall not have her dower, but according to the value it was of in the time of her husband." "E., who was the wife of R., demands one-third part of three acres of land with the appurtenances in E., as her dower, against W., and W. comes and says that he bought the land of her ²⁰⁴ husband, naked and unbuilt upon, and he built upon it; and he willingly allows to her her third part, saving the buildings to himself. And, therefore, she had her seisin, saving to the said W. the houses built by him, etc., because he had, without the buildings, where she might have her land, etc." In *Humphrey v. Phinney*, 2 Johns. 484, Chief Justice Kent, who delivered the opinion in that case, cited the old English cases just quoted, and declared that "such was the law as understood and declared in the most ancient decisions of which we have any record." The American rule follows the rule of the common law: 2 Scribner on Dower, 612. See the rule stated and the authorities collated in support thereof in 5 Am. & Eng. Ency. of Law, 929, note 2. Section 7 of chapter 23 of the Compiled Statutes of 1893 provides: "When a widow shall be entitled to dower out of any lands which shall have been aliened by the husband in his lifetime, and such lands shall have been enhanced in value after the alienation, such lands shall be estimated, in setting out the widow's dower, according to their value at the time when they were so aliened." This statute is declaratory of and follows the common-law rule. But the real estate in this controversy was sold under execution on a judgment

rendered against the husband alone. Was the judicial sale of this real estate and the confirmation and conveyance made in pursuance thereof an "alienation" of such real estate by the husband within the meaning of this statute? It would seem that the alienation mentioned in the statute meant some voluntary act of the husband. The word "alienate" means: "To transfer property to another; to make a thing another man's. In common law to alienate realty is voluntarily to part with ownership in it, by bargain and sale, conveyance, gift, or will." "Alienation" means: "An act whereby one man transfers the property and possession of lands, tenements, or other things to another": Anderson's Law Dictionary. But in *Ayer v. Spring*, 9 Mass. 8, it was held that "where ²⁰⁵ land was taken by execution from a husband, the wife was held to be dowable in the land, as it existed at the time of the extent of the execution, and not in the erections or improvements afterward made"; and in *McClanahan v. Porter*, 10 Mo. 746, it was held that "a purchaser of lands under execution against the husband occupies the same position as the alienee of the husband." To the same effect see *Price v. Hobbs*, 47 Md. 359; *Wood v. Morgan*, 56 Ala. 397. These authorities are quoted with approval, or rather without dissent, in 2 Scribner on Dower, 612. We feel constrained, therefore, to hold that real estate which has been sold under execution on a judgment against the husband alone, such sale confirmed and a conveyance made in pursuance thereof, is real estate aliened by the husband within the meaning of said section 7 of chapter 23.

It appears from the stipulation of facts in this case that the real estate in controversy at the date of the judicial conveyance made thereof in pursuance of its sale on execution was of a certain value, and that the value of the real estate at the date of David Butler's death, exclusive of improvements thereon, was of a different value. The contention of the appellant is that in estimating the value of this real estate for the purpose of assigning Mrs. Butler dower therein, its value at the date of the judicial conveyance thereof made in pursuance of its sale on execution should be taken, while the appellee contends that the real estate as it existed at the date of David Butler's death, excluding improvements made thereon since the date of the sheriff's deed, should be the one adopted. The statute, said section 7 of chapter 23, provides that in estimating the value of the real estate for the purpose

of the widow's dower therein its value at the time it was aliened shall be taken when such real estate shall have been enhanced in value after the alienation. We are thus brought to the consideration of the question, What is the meaning of "enhanced in value" in the statute? Does it mean an appreciation ²⁰⁶ and increase in value from any and all causes, or is it limited in its meaning to appreciation in the value of the real estate by reason of improvements put thereon by the alienee? In *Thornburn v. Doscher*, 32 Fed. Rep. 810, the precise question arose, and the court held that "in estimating the value of a widow's dower in land aliened by the husband in his lifetime, she ought to have the benefit of the increase in value between the date of such alienation and the death of the husband, not arising from improvements made or placed thereon." In *Allen v. McCoy*, 8 Ohio, 418, it is said that in making assignment of dower, the rule of value is to be taken at the time of assignment; but all increased value from actual improvements on the ground is to be excluded. In *McClanahan v. Porter*, 10 Mo. 746, it was held that "where lands have increased in value from extrinsic causes not connected with the labor or expenditure of the alienee, the widow takes according to the value at the time of the assignment." In *Summers v. Babb*, 13 Ill. 483, it was held: "A widow is only entitled to take her dower according to the valuation of the land at the time of the alienation. She is not dowable of improvements put upon the land, but is entitled to the benefit of its increased value, arising from other causes than the labor and expenditure of the alienee." In *Thompson v. Morrow*, 5 Serg. & R. 289, 9 Am. Dec. 358, Tilghman, C. J., discussing the point under consideration, said: "So far as concerns improvements made by the alienee, it is agreed that the tenant shall be protected from this hardship; but as to any value which may chance to arise from the gradually increasing prosperity of the country, and not from the labor or money of the alienee, it would be hard indeed upon the widow if she were precluded from taking her share of it. She runs the risk of any deterioration of the estate which may arise either from public misfortune, or the negligence, or even the voluntary act of the alienee; for, although he destroy the buildings erected by the husband, ²⁰⁷ the widow has no remedy, nor can she recover any more than one-third of the land as she finds it at the death of her husband." And in *Powell v. Monson etc. Mfg. Co.*, 3 Mason, 347, Mr. Justice

Story, referring to the opinion of *Thompson v. Morrow*, 5 Serg. & R. 289, 9 Am. Dec. 358, said: "This doctrine appears to me to stand upon solid principles and the general analogies of the law. If the land has in the intermediate period risen in value, she receives the benefit; if it has depreciated, she sustains the loss. . . . If, on the other hand, the value of the land has increased solely from the improvements made upon it, and without those improvements it would have remained of the same value as at the time of the alienation, the old value, and not the improved value, is to be taken into consideration. For practical purposes it is impossible to make any distinction between the value of the improvements and the value resulting from the improvements; between improvements which operate on a part of the land and those which operate upon the whole. Upon the whole, my judgment is that the dower must be adjudged according to the value of the land in controversy at the time of the assignment, excluding all the increased value from the improvements actually made upon the premises by the alienees, leaving to the dowress the full benefit of any increase of value arising from circumstances unconnected with those improvements." We think the reasoning of these cases is unanswerable, and we therefore conclude that in estimating the value of real estate aliened by the husband during his marriage for the purpose of assigning his widow dower therein, the value of the real estate is to be estimated as it stood at the time of the assignment of dower, excluding the increase in value of the real estate resulting from improvements made thereon by the alienees after the date of the alienation.

The judgment of the district court is affirmed.

DOWER—WHETHER EXTINGUISHED BY EXECUTION OR JUDICIAL SALE AGAINST HUSBAND.—A widow's right to have dower assigned to her out of the lands of her deceased husband is not subject to an execution at law: *McMahon v. Gray*, 150 Mass. 289; 15 Am. St. Rep. 202, and note. A right of dower is superior to all judgment liens accruing after the marriage: *Ficklin v. Rixey*, 89 Va. 832; 37 Am. St. Rep. 891, and note. This question is fully discussed in the notes to *Thompson v. McCorkle*, 43 Am. St. Rep. 348; *Moore v. Mayor*, 59 Am. Dec. 475; *Combs v. Young*, 26 Am. Dec. 231, and *Den v. Frew*, 22 Am. Dec. 710.

DOWER—DEFINITION.—Dower is the provision made by law for the wife out of the lands and tenements of her husband for her support and maintenance after his death: *Adams v. Storey*, 135 Ill. 448; 25 Am. St. Rep. 392.

DOWER IT NOT FOUNDED IN CONTRACT, but results from marriage as a legal incident thereto: *Magee v. Young*, 40 Miss. 164; 90 Am. Dec. 322, and note; *Bishop v. Boyle*, 9 Ind. 169; 68 Am. Dec. 615.

DOWER—VALUE OF AT WHAT TIME TO BE COMPUTED.—A widow is entitled to dower only according to the value of the land at the time of alienation, and not according to its improved value at the time of demand: *Van Doren v. Van Doren*, 2 Penn. 697; 4 Am. Dec. 408, and note; *Hale v. James*, 4 Johns. 258; 10 Am. Dec. 328; *Muhoney v. Young*, 3 Dana, 588; 28 Am. Dec. 114; *Waters v. Gooch*, 6 J. J. Marsh. 586; 22 Am. Dec. 108.

EXECUTION OR JUDICIAL SALES—CAVEAT EMPTOR.—The rule of caveat emptor applies on sales of land under execution: *Stearns v. Edson*, 63 Vt. 259; 25 Am. St. Rep. 758, and note; *Bullard v. McArdle*, 98 Cal. 355; 35 Am. St. Rep. 176, and note; and see, also, the note to *Bond v. Montgomery*, 35 Am. St. Rep. 126.

CHAFFEE v. ATLAS LUMBER COMPANY.

[48 NEBRASKA, 224.]

CONSIDERATION.—A MORTGAGE GIVEN FOR THE PURPOSE OF PAYING A PRE-EXISTING INDEBTEDNESS is based upon a sufficient consideration, and protects the mortgagee to the same extent as if a new consideration had been given when the mortgage was executed.

INSOLVENT DEBTORS—PREFERENCES.—A debtor in failing circumstances may lawfully pay or secure one creditor to the exclusion of others.

MORTGAGE—THOUGH THE POSSESSION OF MORTGAGED CHATTELS by the mortgagor raises the presumption that the mortgage was fraudulent, yet it is not conclusive, but may be overcome by evidence of the good faith of the transaction.

MORTGAGE.—A PRESUMPTION OF FRAUD ARISING from a mortgagor remaining in possession of mortgaged chattels terminates when he surrenders such possession to the mortgagee.

MORTGAGE OF CHATTELS—MODE OF SALE UNDER.—The fact that a mortgagee sells the mortgaged chattels in a mode different from that stipulated for in the mortgage does not make it fraudulent, nor otherwise invalidate it, nor give priority to junior liens.

Martin Langdon, McClure & Anderson, and I. Dunn, for the plaintiff in error.

W. S. Morlan, contra.

226 NORVAL, C. J. This action was brought by the Atlas Lumber Company, a corporation, against one S. S. Hewitt, to recover possession of a stock of lumber and building material situated in the town of Beaver City. The plaintiff claimed the property under a chattel mortgage executed by one William M. Ingalls, and by him delivered to the plaintiff. Hewitt, as sheriff of Furnas county, held the property under a writ of attachment issued out of the district court of said county in a suit wherein the Howell Lumber Company was plaintiff and said Ingalls was defendant. C. L. Chaffee, being the successor of the Howell Lumber Company, and the

owner of all the property and accounts belonging to said company, was, on his own motion, substituted by the court as defendant in place of the sheriff. Upon the trial the jury returned a verdict in favor of the plaintiff, and assessing his damages in the premises at one cent. The defendant filed a motion for a new trial, which was overruled, and judgment ²²⁷ was thereupon entered by the court upon the said verdict of the jury.

The first contention made by counsel in the brief of plaintiff in error is, that the verdict is contrary to, and is not supported by, sufficient evidence. It appears from the evidence in the record that the defendant in error on, and for a long time prior to, April 30, 1890, was engaged in the lumber business at Beaver City, this state, the enterprise being conducted by one William M. Ingalls, its manager. On the date aforesaid the Atlas Lumber Company sold and disposed of the business and stock on hand to said Ingalls for the sum of \$2,700, Ingalls paying \$1,300 of the consideration in cash, and the balance, amounting to \$1,400, was divided into four equal payments of \$350 each, for which Ingalls gave his notes, but the same were unsecured. Two of these notes having matured, and the same not having been paid, one Burt Coldren, a representative of the defendant in error, about the last of July or the first of August, 1890, went to Beaver City, interviewed Mr. Ingalls, and requested that he take up the old notes and give new ones in their place, and secure the same by a chattel mortgage on his stock. Mr. Ingalls objected and refused at that time to give security, on the ground that it would injure his credit. About the sixth day of August, 1890, Mr. Coldren called again upon Mr. Ingalls, and renewed his demand for security, and as an inducement for the latter to secure the claim, Coldren proposed to reduce the rate of interest from ten per cent to eight per cent, and to extend the time of payment one year on other indebtedness of Ingalls to the company. This proposition was finally accepted by Ingalls, and he on said date gave four new notes, amounting to \$1,437.33, payable as follows: One for \$437.33, due October 1st; \$300, due January 1, 1891; \$300, due April 1, 1891; and \$400, due on July 1, 1891. Mr. Ingalls at the same time secured the payment of these notes by a chattel mortgage covering his stock of lumber, ²²⁸ including the property in controversy herein. This mortgage was duly filed in the office of the county clerk of Furnas county, on the next day

after it was executed. At the same time, as further security for said indebtedness, Ingalls assigned to defendant in error a mechanic's lien upon a church building for \$372, and transferred accounts due him amounting to something less than \$500, which accounts were deposited for collection in a bank at Beaver City. After the giving of the mortgage Ingalls remained in possession of the stock, and sold the same in the usual course of business. About the first day of May, 1890, Ingalls purchased, on sixty days' time, of the Howell Lumber Company, lumber and building material amounting to the sum of \$1,664, no part of which has been paid. For some cause or other Ingalls did not succeed in his business venture, and on or about the twentieth day of September, 1890, he left Beaver City for Salt Lake City, with the purpose of not returning. He met Mr. Howard, the president of the defendant in error, at Denver, and on September 23d, at the request of Howard, and as a further or additional security for his indebtedness, he executed a bill of sale to the Atlas Lumber Company of his entire stock of lumber and building material, which was recorded on the twenty-seventh day of said month in Furnas county. On the thirteenth day of October, 1890, the Howell Lumber Company attached the stock on hand, which was covered by said chattel mortgage and bill of sale, and the sheriff held the same until replevied in this suit.

It is insisted that the chattel mortgage was given by Ingalls and received by the defendant in error for the purpose of defrauding the Howell Lumber Company. This contention is not well founded. The uncontradicted testimony shows that the mortgage was given for the sole purpose of paying a bona fide pre-existing debt, a portion thereof being then past due. This was a sufficient consideration, and protects the defendant in error to the same ²²⁹ extent as though there had been a new consideration given when the mortgage was executed: *Turner v. Killian*, 12 Neb. 580; *Henry v. Vliet*, 36 Neb. 138. It is true that the officers of the Atlas Lumber Company were aware, when the mortgage in question was taken, of the indebtedness of Ingalls to the Howell Lumber Company, and that Ingalls was being pressed by the latter for the payment thereof, but this did not invalidate the mortgage. It is no longer a mooted question in this state that a debtor, in failing circumstances, as was Ingalls when the mortgage was executed, may lawfully pay or secure one

creditor to the exclusion of others: *Lininger v. Raymond*, 12 Neb. 19; *Deitrich v. Hutchinson*, 20 Neb. 52; *Rothell v. Grimes*, 22 Neb. 526; *Ward v. Parlin*, 30 Neb. 376. Instead of there being an intention to defraud, either on the part of the mortgagor or mortgagee, the contrary conclusively appears from the record. It was only after much persuasion that Ingalls was induced to give the security. But it is contended that the fact the mortgagor remained in possession and sold lumber and converted the moneys derived therefrom to his own use shows the transaction to be fraudulent, and that the mortgage was a mere device to assist Ingalls to prevent his other creditors from collecting or securing their claims. While the possession of mortgaged chattels by the mortgagor raises the presumption that the mortgage was fraudulent, yet it is not conclusive, but may be overcome by evidence showing that the same was made in good faith: *Robison v. Uhl*, 6 Neb. 328; *Miller v. Morgan*, 11 Neb. 121; *Turner v. Killian*, 12 Neb. 580; *Davis v. Scott*, 22 Neb. 154. In the case at bar there is no question, from the evidence adduced, that the mortgage and the bill of sale were made in the utmost good faith and without any intent to defraud the creditors of Ingalls. Again, the presumption of fraud raised by the statute from the possession of mortgaged chattels by the mortgagor remains only so long as the ²³⁰ mortgagor retains such possession. In this case there is ample testimony to establish, and which would have justified the jury in drawing the conclusion, that at and some time prior to the levying of the attachment the defendant in error was in possession of the stock of lumber, holding the same under the chattel mortgage and bill of sale, already alluded to as security for a bona fide debt. We have no hesitancy in saying that the verdict and judgment are supported by sufficient evidence: *Sherwin v. Gaghagen*, 39 Neb. 238.

The next assignment in the petition in error is in the following language: "The court erred in giving the following instructions upon its own motion, to wit: Nos. 2, 3, 4, 5, 6, 7, 8, and the following part of the eighth instruction: 'But a mortgage to a creditor taking a mortgage, or buying a stock of goods for the purpose of securing a bona fide claim of such mortgagee, is not fraudulent, even if such mortgagee knows that by such mortgage or sale other creditors are defrauded'; 9, 10, 11, 12, 13, 14, 15, 16, and 17." The foregoing assignment is insufficient, and must be overruled, under the re-

peated holdings of this court, unless it can be sustained as to all the instructions therein mentioned. Plaintiff in error, in the brief filed, claims a reversal alone for the giving of seven out of the sixteen instructions complained of in the assignment, thereby, in effect, conceding that the remaining nine instructions, to which no criticism is offered, are not erroneous. Several paragraphs of the charge of the court covered by the assignment, if not all of them, not only lay down correct legal propositions, but are applicable to the issues made by the pleadings and evidence, among which are the eleventh, thirteenth, and seventeenth, which read as follows:

“11. The law presumes transactions are honest, and made for an honest purpose, until the contrary is shown; and the burden of the proof to show a dishonest purpose in this case is upon the defendant.”

231 “13. The jury are instructed that a person who is indebted, and unable to pay all his debts in full, has a right to prefer any one or more of his creditors to the exclusion of all others; and in payment of a bona fide indebtedness to one of his creditors, a debtor may exhaust the whole of his property, so as to leave nothing for the other creditors who are equally meritorious.”

“17. A pre-existing debt already due is a good consideration for a chattel mortgage or bill of sale to secure the payment of the same, and protects the party taking such security to the same extent as would a new consideration given at the time of the making of the mortgage or bill of sale.”

The last two instructions just quoted are in line with the decisions of this court already cited in this opinion, and the eleventh instruction states an elementary principle of law. This assignment is, therefore, overruled without considering any of the other instructions embraced in such assignment.

At this time we will dispose of another assignment, namely, “The court erred in refusing the following instructions asked by the defendant: Nos. 4, 5, 6, 7, 8, 9, 10, 11, 12, and 14.” It is not deemed necessary to set out these requests to charge in this opinion. Suffice it to say, that the propositions of law enunciated in the fourth and fifth requests were fully stated in the instructions given by the court, and it was not error to refuse to charge the jury again upon the same points. The fourth and fifth requests having been properly refused, this assignment, for the reasons stated in our discussion of

the preceding assignment, will be dismissed without further consideration.

Complaint is finally made because the court, at the request of the plaintiff below, gave this instruction: "1. The jury are instructed that to entitle the plaintiff to recover in this case it is only necessary that he should prove by a preponderance of the evidence that he had a ²³² valid lien on the property replevied to secure an honest, bona fide debt, and was entitled to possession by virtue of such lien at the time of the commencement of this action, and it was wrongfully detained by the defendant. So far as this action is concerned, it is immaterial whether the plaintiff, after taking possession of said property, sold the same under one or another of his claimed liens, whether he sold at private or public sale, or what disposition he made of the property."

The criticism made is upon the last clause of the above instruction. It is contended that it does not correctly state the law, but, on the contrary, that it is material what the plaintiff below did with the property after taking possession thereof. The evidence discloses, after the Atlas Lumber Company acquired possession of the stock under its mortgage and bill of sale, that it sold the property in the usual course of business for the purpose of paying its claim. This method of sale did not conflict with any of the terms of the bill of sale, although the same was not in compliance with the requirements of the chattel mortgage or the statute relating to the foreclosure of such instruments. Since the mortgagee was claiming under the bill of sale, as well as the mortgage, it could make no difference, so far as the validity of his lien was concerned, that the property was sold at private, instead of public, sale. While a mortgagee of chattels must dispose of the property according to the stipulation of the mortgage, and the provisions of the statute governing the foreclosure of chattel mortgages, yet it is not the law if he fails so to do in any essential particular, or if he omits to sell the property after taking possession of the same, that the mortgage is thereby invalidated and the lien lost, but in either case when other creditors have a junior claim upon the property, the mortgagee must account for its value: *Linsinger v. Herron*, 23 Neb. 197; *Loeb v. Milner*, 21 Neb. 392. It matters not, so far as the mortgagor or his other creditors are concerned, ²³³ whether the property was sold at private or public sale, or what the mortgagee did with the property after

the same came into its possession. The instruction, therefore, was not erroneous.

The judgment is affirmed.

CHATTEL MORTGAGES—CONSIDERATION.—A PRE-EXISTING debt already due is a good consideration for a chattel mortgage, and protects the mortgagee to the same extent as would a new consideration given at the time of making the mortgage: *Henry v. Vliet*, 33 Neb. 130; 29 Am. St. Rep. 478, and note. But see *Union Nat. Bank v. Oism*, 3 N. Dak. 193; 44 Am. St. Rep. 533.

CHATTEL MORTGAGES—RETENTION OF POSSESSION OF CHATTELS BY MORTGAGOR.—A chattel mortgage without immediate delivery or change of possession of the property is void as to creditors: *Mandeville v. Avery*, 124 N. Y. 376; 21 Am. St. Rep. 678, and note. See, also, the notes to *Rathbun v. Berry*, 33 Am. St. Rep. 395, and the extended note to *Peabody v. Landon*, 15 Am. St. Rep. 912.

CHATTEL MORTGAGES—POWER OF SALE IN, HOW MUST BE EXERCISED. This subject is fully discussed in the extended note to *Wygal v. Bigelow*, 16 Am. St. Rep. 499.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS—PREFERENCES.—A debtor may lawfully prefer one creditor over another: *Kalmus v. Ballin*, 52 N. J. Eq. 290; 46 Am. St. Rep. 520, and note.

HODGKINSON v. HODGKINSON.

[48 NEBRASKA, 269.]

HUSBAND AND WIFE. — A MARRIED WOMAN MAY MAINTAIN AN ACTION FOR THE ALIENATION OF HER HUSBAND'S AFFECTIONS if the statute of the state entitles her, while married, to sue and be sued as if she were unmarried.

E. W. Thomas and G. W. Cornell, for the plaintiffs in error.

Stull & Edwards, contra.

370 RYAN, C. The defendant in error recovered a judgment against plaintiffs in error in the district court of Nemaha county. The cause of action, as stated, was that plaintiffs in error had induced their son, her husband, permanently to abandon the defendant in error, and to refuse to provide for her support. In connection with the history of desertion brought about as aforesaid, there were allegations that plaintiffs in error had manifested the most determined and persistent disapproval of becoming grandparents, and that to prevent this consummation they had induced their son to attempt to procure an abortion, which had failed, whereupon defendant in error was driven from the house of

plaintiffs in error, wherein, with her husband, she had previously been living, and the separation and abandonment complained of immediately followed. The evidence was very conflicting, but there was sufficient to sustain the averments of the petition. There was presented in the motion for a new trial a claim that, because of surprise, plaintiffs in error should have been granted a new trial. In support of this claim there seems to have been used certain affidavits, but as there was no identification or preservation of them by bill of exceptions, they cannot be considered. No other error arising during the trial was presented or argued. The giving and refusal to give instructions afford no ground of complaint, for exception was taken only to a refusal to give one instruction requested, and the substantial part of that instruction was embodied in others given by the court on its own motion.

It is contended, however, that this action was not maintainable by the defendant in error, and that in any event a recovery could be had only for the loss of services of the husband. In respect to the proposition last mentioned it perhaps would be a sufficient answer to point out that at common law the services and chattels of the husband did ^{not} belong to the wife, as did those of the latter to the former, or which reason the general rule contended for is not derivable from a mere analogy as urged in argument. The right of the wife to bring this action in her own name is conferred by section 8 of chapter 53 of the Compiled Statutes, which provides: "A woman may, while married, sue and be sued, in the same manner as if she were unmarried." In *Bennett v. Bennett*, 116 N. Y. 584, there is a satisfactory discussion of the rights of a married woman to recover for damages to herself under the rules of the common law, and as the same are affected by the provision of our statute above quoted, and it is shown that at the common law the right to the recovery of damages existed but could only be had by the husband and wife jointly, on the theory that during coverture the independent claims of the wife to rights of action and chattels were suspended. By the statutory provision that a woman may, while married, sue as if she were single this condition of suspension was terminated, and the wife could then sue just as at common law she could sue in her own name when the suspension of her right in that respect had been ended by the death of her husband. See, also, in support of the right

of a married woman to maintain an action of the nature of that at bar, the case of *Warren v. Warren*, 89 Mich. 123.

The judgment of the district court is affirmed.

HUSBAND AND WIFE—ALIENATION OF AFFECTIONS.—Under statutes giving the wife a separate legal existence, and placing her, with respect to her property and personal rights, upon an equality with her husband, she may maintain an action against a third person for alienating her husband's affections and depriving her of his society: *Clow v. Chapman*, 125 Mo. 101; 46 Am. St. Rep. 468, and extended note fully discussing the subject.

GREEN v. HALL.

[43 NEBRASKA, 275.]

THE RIGHT OF APPEAL FROM A JUDGMENT IS NOT WAIVED BY ITS PAYMENT to avoid the sale of the judgment debtor's property under an execution issued for the enforcement of such judgment.

Kennedy, Gilbert & Anderson, for the motion.

E. W. Simeral and William Simeral, contra.

²⁷⁵ RYAN, C. In this case there was an appeal from a deficiency judgment for \$3,578.10, and costs, rendered in the district court of Douglas county, of which judgment a transcript was duly filed in the office of the clerk of the district court of Lancaster county. For its collection there afterward, on October 6, 1892, was placed in the hands of the sheriff of the last-named county an execution, under and by virtue of which the sheriff advertised for sale 116 lots, owned by appellant Coffman. The date fixed for this sale was ²⁷⁶ November 29, 1892. It does not appear, however, why this sale was not made, neither does the sheriff's return show a postponement. The execution was returned, paid in full July 6, 1893, on which day there was executed by the sheriff a receipt for the costs. The judgment, with accruing interest, was discharged by the following payments: January 4, 1893, \$504.37; March 2, 1893, \$2,904.72; June 19, 1893, \$355.50. All these payments, as will readily be seen, were made while the sheriff held the execution for the collection of the judgment, in extinguishment of which they were made. The appellee, after the case had been submitted for final determination, filed a motion to dismiss the appeal for the reason that the judgment appealed from had been fully, actually, unconditionally, and voluntarily paid by one of the

appellants. In resistance of this motion the appellants have submitted the affidavit of Victor H. Coffman, the appellant by whom the payments were made, to which affidavit he attached a copy of the execution and return showing the receipt of the execution by the sheriff, his advertisement of the lots of Coffman for sale as above described, and the date whereon said return was made, and the payment of costs. The dates of the several payments above recited were shown in support of the motion of appellee. Coffman's affidavit was to the effect that to avoid a sale of the lots advertised he had made these payments, and that they were not voluntarily made. There was given no supersedeas undertaking to suspend the enforcement of the judgment against appellants, as might have been done under the provisions of section 677 of the Code of Civil Procedure. Under these circumstances a sale of the property advertised would have vested in the purchaser a title which could not be affected by the reversal of the judgment appealed from: Code Civ. Proc., sec. 508.

In support of the motion to dismiss there has been cited but one precedent, which, it is claimed, is found in *Hipp v. Crenshaw*, 64 Iowa, 404. There is, however, in the case cited a recognition of the principle that, if payment of a judgment appealed from is made under duress, the appeal should not be dismissed on motion of the appellee based solely on the fact of such payment. It was held that the appeal should be dismissed because the payment had been made merely to enable appellant to obtain a loan on real property affected by the lien of the judgment appealed from, a condition of affairs which did not justify the inference of duress. The right of a judgment debtor to have an appeal determined, notwithstanding payment thereof has been coerced by legal process during its pendency, is sustained by *Hiler v. Hiler*, 35 Ohio St. 645; *Ex parte Walter*, 89 Ala. 237; 18 Am. St. Rep. 103. In *Scholey v. Halsey*, 72 N. Y. 578, it was moreover held not indispensable to a right of recovery of money paid on a judgment before its reversal to show that such payment had been coerced by execution.

The motion of appellee to dismiss this appeal should be overruled.

APPEAL AFTER SATISFACTION OF JUDGMENT.—An appeal does not lie from a discharged and satisfied judgment: *State v. Conkling*, 54 Kan. 108; 45 Am. St. Rep. 270, and extended note.

GLASS v. ZUTAVERN.

[48 NEBRASKA, 334.]

HUSBAND AND WIFE—PRESUMPTION OF FRAUD.—If a mortgage from a husband to his wife must prevent his creditors from realizing their claims against him, it is presumed to be fraudulent, and she must assume the burden of proving that it was made in good faith.

PRACTICE—APPELLATE PROCEDURE.—The question whether the evidence sustains the judgment cannot be considered in the absence of a bill of exceptions properly authenticated, and a bill authenticated by the clerk of the court under circumstances not authorizing him to act is unavailing.

T. Appelget, for the plaintiff in error.

C. Rood and S. P. Davidson, contra.

335 Post, J. This was an action in the district court for Johnson county to recover for the conversion of a stock of drugs and druggists' fixtures. The plaintiff below, who is also plaintiff in this court, claimed through James R. Glass, her husband, under a chattel mortgage to secure an alleged indebtedness to her, while the defendant Zutavern, as sheriff, and the other defendants as attaching creditors, claimed through certain orders of attachment issued in actions commenced by them against the said James R. Glass. There was a verdict and judgment for the defendants, from which the plaintiff has prosecuted proceedings in error in this court.

The first of the alleged errors is that the district court erred in modifying two instructions asked by the plaintiff. The modifications complained of consist in the addition to a paragraph evidently intended as a statement of the facts essential to entitle the plaintiff to recover, the proposition that the jury must be satisfied that the plaintiff's mortgage was in good faith for a sufficient consideration, and not for the purpose of defrauding the creditors of the mortgagor. There was no error in the action assigned. Indeed, the instructions as submitted failed to state the law applicable to the case on trial, and to have given them in the form presented would have been prejudicial error. It had been clearly shown that the effect of the mortgage of the plaintiff from her husband was to defeat the creditors of the latter, and to prevent them from realizing on their claims against him. It was, therefore, presumptively fraudulent, and the burden was upon the plaintiff to prove the 336 contrary; hence the direction that she must affirmatively establish her good faith was rightly given.

It is next complained that the court erred in giving instructions 1, 2, 3, 4, and 5, asked by the defendants, and 1, 2, 3, 4, 5, and 6, on its own motion. This method of assigning errors, it has been frequently held, is insufficient, provided any of the instructions complained of correctly state the law, and it is conceded that some of them do in this case. It is next argued that the court erred in refusing instructions 5 and 10 asked by the plaintiff. But the first-named instruction is not contained in the record, while we find no exception to the refusal of the other, if indeed it was refused, which is not clear from the record.

The only other assignment is, that the evidence does not sustain the judgment. But that question cannot be considered in the absence of a bill of exceptions properly authenticated. The only pretense of an observance of the statutory requirements for the settlement and allowance of exceptions is a certificate of the clerk to the effect that "the foregoing is all the evidence given or offered, with the rulings and exceptions thereon," etc. It is only in the exceptional cases enumerated in section 311 of the Civil Code that the clerk is authorized to allow and sign the exceptions: *Scott v. Spencer*, 42 Neb. 632, and cases cited. The certificate of the clerk being without authority, it follows that the question of the sufficiency of the evidence is not presented to this court.

The judgment of the district court must therefore be affirmed.

FRAUDULENT CONVEYANCES BETWEEN HUSBAND AND WIFE.—A voluntary conveyance to a wife is fraudulent, as to pre-existing creditors, if made when the donor is in embarrassed financial circumstances, though he retains property nominally more than equal to all his indebtedness, if the property retained proves insufficient to discharge all his liabilities: *Marmon v. Harwood*, 124 Ill. 104; 7 Am. St. Rep. 345, and note. A husband may give a deed or mortgage to his wife to secure a pre-existing bona fide debt owing her, and such conveyance is not void as to his other creditors: Note to *Daggett v. Bulfer*, 31 Am. St. Rep. 466. The fact that property is purchased by the wife and partly paid for by the husband, and the deed taken in the name of the wife, coupled with an existing indebtedness of the husband, makes a prima facie case of fraud: *Reel v. Livingston*, 34 Fla. 377; 43 Am. St. Rep. 202, and note. A transfer of a considerable portion of property by a debtor, when in failing circumstances, to his wife, and immediately after acquiring it, may, unexplained, raise a presumption of fraud, but all taint of suspicion may be removed by showing the utmost good faith in the transaction: *Williams v. Harris*, 4 S. Dak. 22; 46 Am. St. Rep. 753, and note. See, also, the extended note to *Henderson v. Henderson*, 19 Am. St. Rep. 657.

APPEAL—BILL OF EXCEPTIONS—NECESSITY FOR.—Where no bill of exceptions to the opinion of the trial judge is taken, the question is not properly before this court for its decision, and any opinion it might express thereon would be extrajudicial: *Allaire v. Hartshorne*, 21 N. J. L. 665; 47 Am. Dec. 175; *Graham v. McCreary*, 40 Pa. St. 515; 80 Am. Dec. 591. Only the facts stated in the bill of exceptions can be judicially noticed on writ of error: *Wood v. Jackson*, 8 Wend. 9; 22 Am. Dec. 603; *Forsyth v. Matthews*, 14 Pa. St. 100; 53 Am. Dec. 522, and note.

JOHNSON v. HARDY.

[43 NEBRASKA, 368.]

EJECTMENT.—A TENANT IN COMMON CANNOT, in an action of ejectment, recover possession of the whole of the property against a person in possession without any right. The recovery must be limited to the extent of the plaintiff's title.

Ricketts & Wilson, for the plaintiff in error.

Abbott, Selleck & Lane, contra.

368 RAGAN, C. This is an action of ejectment brought by William E. Hardy and Cora K. Pitcher against Andrew J. Johnson, in the district court of Lancaster county. Hardy and Pitcher, in their petition, alleged that they were the owners of and had a legal estate in lot 1, block 2, in J. O. Young's south addition to East Lincoln, and were entitled to the immediate possession thereof; and that Johnson had held the possession of said real estate against them since the first day of May, 1890. The answer of Johnson was a general denial, the statute of limitations, and adverse possession of the property for more than ten years prior to the bringing of the suit. Hardy and Pitcher had a verdict and judgment, and Johnson brings the case here on error.

The petition in this case was filed on the seventeenth day of September, 1890, and summons duly issued. This summons was returned on the 29th of September, 1890, not served, because Johnson could not be found in the county. On the 9th of February, 1891, an alias summons was issued for Johnson, which was duly served on him. This action, 369 then, was commenced against Johnson on the ninth day of February, 1891, the date of the alias summons which was served on him: Code Civ. Proc., sec. 19. The undisputed evidence in the case is that Cora K. Pitcher conveyed her interest in the property in question to one Thomas P. Ken-

nard, by a deed, on October 27, 1890, which deed was duly witnessed, acknowledged, and recorded in the office of the recorder of deeds of Lancaster county on November 6, 1890. At the time this suit was brought Cora K. Pitcher had no interest whatever in the premises in controversy; and, for the purposes of this case, it may be said that, at the time the suit was brought, the premises were owned by William E. Hardy and Thomas P. Kennard as tenants in common.

On the trial of the case Johnson requested the district court to charge the jury that if they should find from the evidence that prior to the 9th of February, 1891, Cora K. Pitcher had parted with her interest in the property in controversy, the plaintiffs could not recover in the action. The court refused to give this instruction, and charged the jury as follows: "Plaintiffs claim to own and to have the legal title to the premises in controversy together, and are in law called co-tenants. If you find from the evidence that prior to the ninth day of February, 1891, either of the plaintiffs to this action conveyed and parted with any or all of his or her interest in said premises, and if you should find from the evidence that the plaintiffs, or either of them, at the commencement of this action, were the owners of a portion only of said premises, and had the legal title thereto, and were entitled to immediate possession thereof, then you are instructed that you should find for the plaintiffs, or either of them, to the extent which the testimony shows their or either of their interest in the said premises to be." The jury found "that the plaintiffs have a legal estate in and are entitled to the possession of the real property described in the petition," and the court ³⁷⁰ rendered judgment as follows: "It is therefore considered and adjudged by the court that the said plaintiffs William E. Hardy and Cora K. Pitcher have the legal estate in and are entitled to the possession of the premises described in the petition." Here, then, we have a joint suit by two parties who allege that they are the owners of certain real estate, a finding of the jury that the two parties are the owners of the real estate, and a judgment pronounced in accordance with such finding. As already stated, the undisputed evidence in the case is that prior to the commencement of the suit Cora K. Pitcher had parted with her interest in the property. The finding of the jury, then, is contrary to the evidence and contrary to the instruction given by the court.

But it is said that this verdict and judgment should not be

disturbed because the seisin and possession of one tenant in common are the seisin and possession of the others; and that one tenant in common may maintain an action of ejectment in his name for the entire premises against a disseisor thereof. To support this proposition we are cited to *Crook v. Vandervoort*, 13 Neb. 505. In that case this court did so decide; but in *Mattis v. Boggs*, 19 Neb. 698, *Crook v. Vandervoort*, 13 Neb. 505, was expressly overruled, and the law declared to be that "in ejectment by a tenant in common against a person in possession without right the plaintiff can recover only to the extent of his title." The question arose again in *Kirk v. Bowling*, 20 Neb. 260, and it was again held "a tenant in common of real estate can only recover in ejectment to the extent of his title." The two cases last cited are decisive of the question at bar.

The judgment is reversed and the cause remanded to the district court with instructions to permit Hardy to amend his petition, if he so desires, by making his cotenant a party plaintiff or defendant, upon paying all the costs in the suit up to such time.

Judgment accordingly. —

COTENANCY—EJECTMENT AGAINST STRANGER.—A tenant in common is, as against every person but his cotenant, entitled to the possession of every part of the common land, and may recover such possession in an action of ejectment brought against a stranger to the common title: *Allen v. Higgins*, 9 Wash. 446; 43 Am. St. Rep. 847; *Freeman on Cotenancy and Partition*, sec. 343. The owner of an undivided one-fourth interest in land, who, acting solely for himself, sues in ejectment to recover the whole tract from a party in possession under an adverse title, can recover possession of his own share if it appears that he and the remaining three-fourths have no community of interest, and claim under different titles: *King v. Hyatt*, 51 Kan. 504; 37 Am. St. Rep. 304, and note.

SCOTT v. ROHMAN.

[43 NEBRASKA, 618.]

JUDGMENTS.—THE FAILURE OF THE JUDGE TO SIGN A JUDGMENT does not invalidate it, though the statute provides that he shall subscribe the records of his court. Such statute is directory only, and his omission to comply with it does not render the judgment inoperative or void.

A JUDGMENT MAY BE GARNISHED in a suit against the judgment creditor when the process of garnishment issues from the same court, but not otherwise.

JUDGMENT.—AN ASSIGNMENT OF A JUDGMENT is not liable to be defeated by a subsequent garnishment of the judgment debtor.

A. G. Greenlee, for the appellant.

*Webster, Rose & Fisher*dick, *Daniel F. Osgood*, *Abbott & Abbott*, and *Thomas Ryan*, contra.

¶19 NORVAL, C. J. This suit was instituted in the district court of Lancaster county by the appellant to determine the rights of the respective parties to certain moneys which had been paid by John Fitzgerald to the clerk of said court in satisfaction of a judgment which had theretofore been rendered therein in a cause wherein one John Lanham was plaintiff and said ¶20 Fitzgerald was defendant. Issues were formed, and upon the trial the court made the following findings of fact:

"1. That in an action then pending in this court between John Lanham as plaintiff and John Fitzgerald as defendant, for recovery of money alleged to be due the plaintiff Lanham from defendant Fitzgerald, on a contract in writing, the jury on the twenty-fifth day of February, 1893, returned a verdict in favor of Lanham, and assessing the amount of his recovery at the sum of \$1,108.18. To which finding the defendants except.

"2. That Fitzgerald filed a motion for a new trial, which was on the first day of April, 1893, overruled, and on that day the court entered judgment on said verdict in favor of Lanham for amount therein stated.

"3. That on the first day of April, 1893, Webster, Rose & Fisherdick, defendants, filed in this court notice of claim of lien on said judgment for \$390, their fee as attorneys for Lanham in said suit.

"4. That on the seventeenth day of April, 1893, Abbott & Abbott, defendants, filed in this court their notice of claim of lien on said judgment for \$250, their fees as attorneys for Lanham in said court.

"5. That on the tenth day of April, 1893, the defendant, C. H. Rohman, filed in this court an assignment of said judgment by Lanham to him, by its terms, however, subject to the liens of the above-named attorneys in findings three and four.

"6. That on the twenty-fifth day of February, 1893, in the cases of *Archie A. Scott v. John Lanham*, and *Perry S. Chapman v. John Lanham*, in the county court of Lancaster county, wherein judgments had theretofore been had, and executions returned unsatisfied, affidavits in garnishment were therein

filed, on which issued summonses against John Fitzgerald, garnishee, and same were served on him on the twenty-seventh day of February, 1893.

"7. That Fitzgerald, on March 14, 1893, made answer ⁶²¹ in said cases as garnishee, setting up the said verdict in Lanham's favor against him; that no judgment had yet been rendered thereon; that if judgment thereon should be entered and not reversed or otherwise vacated, he would be indebted in some amount to Lanham, and asked that a hearing on his answer be continued until it is determined whether or not he, as garnishee, is indebted to Lanham; whereupon the county judge entered an order continuing the further answer of the garnishee until April 15, 1893.

"8. That on the fifteenth day of April, 1893, Fitzgerald made further answer in said causes in the county court, setting up that judgment in said district court had been rendered in favor of Lanham for \$1,018.18 against him; that it was unpaid, still owned by him, and that it had been stayed for nine months from April 1, 1893; that subsequent to the service of notice of garnishment upon him the said judgment had been assigned to said Rohman subject to said liens of Webster, Rose & Fisherick and Abbott & Abbott, and that when said notice was so served, and at the time of his former answer, he had no notice of any attorney's lien on said judgment.

"9. That on the twenty-fifth day of April, 1893, orders issued on said answers of Fitzgerald from the county court, commanding him to pay into said court on January 1, 1894, to be applied on the judgment of Scott against Lanham, the sum of \$314.30, with seven per cent interest thereon from the sixth day of December, 1890, and also \$16.65 costs of suit; and commanding him to pay into said county court at the same time, to be applied on judgment of Chapman against Lanham, \$86.50, with seven per cent interest from the seventeenth day of January, 1891, and \$16 costs of suit.

"10. That plaintiff Scott is the owner and holder of the Chapman judgment.

"11. That on the sixteenth day of December, 1893, Fitzgerald paid into this court the sum of \$1,060.10, being ⁶²² said judgment, \$1,018.18, with seven per cent interest thereon from April 1, 1893, where the same now remains in the hands of the clerk.

"12. That the assignment by Lanham to Rohman was for

a valuable consideration. Plaintiff excepts to said twelfth finding of fact.

"13. The court further finds that there appears in docket 18, page 60, of the county judge's docket of Lancaster county, state of Nebraska, an entry bearing date November 5, 1890, in a case entitled '*Archie A. Scott v. John Lanham*'; that the court finds that there is due the plaintiff, from the defendant, the sum of \$314.30, and it is therefore considered and adjudged that the plaintiff recover from the defendant the sum of \$314.30, and the costs of this action, taxed at \$6.45; and the court finds that said entry is not in the handwriting of the then county judge, nor is it signed by the then county judge, or by any county judge, but the court finds it is in the handwriting of C. Y. Long, who was employed in the county judge's office for the purpose of writing up its records. The court further finds that the minutes of the court in the term calendar, upon which said judgment purports to have been rendered, was in the handwriting of the then county judge. To the thirteenth finding of fact the plaintiff duly excepts."

The court found as conclusions of law:

"1. That there is no valid judgment in the county court in the case of *Archie A. Scott v. John Lanham* on which to base proceedings in garnishment. Plaintiff excepts to said first conclusion of law.

"2. That the judgment in the case of *P. S. Chapman v. John Lanham* in said county court is valid.

"3. That the proceedings in garnishment in the county court of Lancaster county, wherein the garnishee is a judgment debtor in an action in the district court of Lancaster county, and the order of the county court on said judgment debtor to pay into said county court a portion of the ⁶²³ debt due from said garnishee on said judgment in the district court, are wholly void and against law. Plaintiff excepts to said third conclusion of law.

"4. That of said \$1,069.10, defendants Webster, Rose & Fisherdict are entitled to \$390 to be first paid therefrom; that defendants Abbott & Abbott are entitled to be paid next from said fund the sum of \$250, and the balance of \$429.10 belongs to the defendant Charles H. Rohman, as assignee of John Lanham, and the clerk is ordered to pay the same to him; that upon payment of said sums the said defendants shall release, and the clerk of this court shall satisfy and discharge of record, the said judgment in favor of John Lan-

ham against John Fitzgerald. To so much of said fourth conclusion of law as gives said judgment fund to said defendants the plaintiff duly excepts.

"5. That plaintiff pay the costs of this action. Plaintiff excepts."

A decree was entered ordering the clerk of the district court to pay out of the funds in his hands: 1. To the defendants Webster, Rose & Fisherdict the sum of \$390; 2. To the defendants Abbott & Abbott the sum of \$250, and the balance of said funds, amounting to the sum of \$429, to the defendant Charles H. Rohman, as assignee of the defendant John Lanham; and, upon the payment of the said several sums that said Webster, Rose & Fisherdict, Abbott & Abbott, and Charles H. Rohman were ordered to release their respective liens upon the said judgment in favor of Lanham, and against Fitzgerald, and the clerk of the district court was ordered to satisfy and release of record said judgment. The plaintiff appeals.

It is stipulated by the parties that the facts in the case are as found by the trial court, with the following exceptions:

"1. The assignment mentioned in the fifth finding was made for the purpose of indemnifying said Rohman against loss upon a contractor's bond, which he had theretofore, ⁶²⁴ to wit, on the — day of February, 1891, signed for the said Lanham as contractor; that at the time said assignment of judgment was made said Rohman did not incur any additional liability, and did not surrender any security or indemnity of any kind whatsoever theretofore held by him. There were, however, claims of various parties made against the said Rohman, seeking to hold him liable upon said bond, and certain of said claims are now in suit in the district court of Lancaster county, pending there upon appeal from the county court of said county, judgment having been rendered against him in the court below.

"2. The judgment in favor of said Lanham, and against Fitzgerald, mentioned in these findings, was paid in for Fitzgerald by Charles McGlave, a clerk in the office of the said Fitzgerald, without the knowledge of Fitzgerald. The said McGlave, at the time he paid said debt, did not know that said judgment had been garnished. The said McGlave, however, had authority, by virtue of his employment, to pay said money into court, and did so for the purpose of satisfy-

ing the said judgment, and relieving the real estate of said Fitzgerald from the lien thereby created, in order that the said Fitzgerald might procure a loan which the said Fitzgerald was at that time negotiating.

"3. That defendant Lanham is insolvent."

It is urged that the judgment in the case of *Archie A. Scott v. John Lanham* is invalid, because the entry thereof in the county judge's docket is not in the handwriting of the then county judge of Lancaster county, and is not attested by his signature. The question raised by the record, so far as we are advised, is now for the first time presented to this court for decision, and we have given the subject such consideration as the time at our disposal will permit. Section 34 of chapter 20 of the Compiled Statutes provides: "Every record made in any probate court, excepting original orders, judgments, and decrees thereof, shall have attached thereto a certificate signed by the judge of such court, showing the ~~625~~ date of such record and the county in which the same is made, and it shall not be necessary to call such judge or his successor in office to prove such record so certified. And in any cause, matter, or proceeding, in which the probate court or probate judge has jurisdiction, and is required to make a record not provided for in this chapter, such record shall be certified in the same way and with like effect as aforesaid." It certainly cannot be maintained, with any degree of success, that the quoted provision requires the county judge to sign judgments in his docket to make them valid. On the contrary, original orders, judgments, and decrees in said court are expressly excepted from the provisions of the statute quoted requiring that the signature or certificate of the county judge should be appended as a verification of every record made by him. Section 31 of said chapter 20 declares: "The probate judge shall keep a docket in which all his proceedings in civil actions shall be entered in like manner, as near as may be, as the proceedings before justices of the peace in civil actions; and the provisions of this code relating to justice's docket shall, as near as may be, apply to the docket of the probate judge." Section 1086 of the Code of Civil Procedure requires every justice to keep a docket, and directs what matters shall be entered therein, but it contains no provision, nor have we been able to find any statute, and none has been cited by counsel, which in express terms makes it necessary for either a county judge or a justice of

the peace to sign judgments entered in his docket. The absence of the signature of the county judge to a judgment, or the record in which the same is entered, is not fatal: *Daniels v. Thompson*, 48 Ill. App. 393; *Lythgoe v. Lythgoe*, 26 N. Y. Supp. 1063.

Our attention has been called to section 447 of the Code of Civil Procedure, which reads as follows: "When the judicial acts or other proceedings of any court have not been regularly brought up and recorded by the clerk thereof, such court shall cause the same to be made up and ⁶²⁶ recorded within such time as it may direct. When they are made up and upon examination found to be correct, the presiding judge of such court shall subscribe the same." This statute relates to records of the several district courts of the state, and contemplates that judgments transcribed upon the journal of such court shall be signed by the presiding judge. Assuming, for the purposes of this case, without deciding the point, that section 447 is applicable to the county and justice's courts, it does not follow that the judgment of *Scott v. Lanham* is void because it is not attested by the signature of the county judge. The provision of said section concerning the signing of the record by the judge is not mandatory, but directory merely, and a noncompliance with the statute does not invalidate a judgment pronounced by the court and duly entered upon the journal. Similar statutes have generally been held to be directory only, and that the omission of the judge's signature does not vitiate the judgment: *Freeman on Judgments*, sec. 50 *e*; *Black on Judgments*, sec. 109; *Vanfleet v. Phillips*, 11 Iowa, 560; *Childs v. McChesney*, 20 Iowa, 434; 89 Am. Dec. 545; *Traer v. Whitman*, 56 Iowa, 445; *Osburn v. State*, 7 Ohio, 212; *Platte County v. Marshall*, 10 Mo. 346; *Rollins v. Henry*, 78 N. C. 342; *Keener v. Goodson*, 89 N. C. 273; *Fontaine v. Hudson*, 93 Mo. 62; 3 Am. St. Rep. 515; *Lockhart v. State*, 32 Tex. Crim. Rep. 149; *French v. Pease*, 10 Kan. 51. In *Fouts v. Mann*, 15 Neb. 172, it was held that the failure of the judge to sign a decree of foreclosure does not render it illegal or void. The entering of the judgment on the docket of the county court was not in the handwriting of the county judge, but of one Long, who was employed in the county judge's office for the purpose of writing up the records of the court. This fact does not render the judgment void. We have been unable to find any legislative enactment which requires that the rec-

ords of the county court shall be in the handwriting of the judge of the court. If they are made up ⁶²⁷ by some other person, under the direction and supervision of the judge, it will be sufficient. The judgment in question appears on the docket of the county court. It was entered there in accordance with the minutes made by the county judge in his own handwriting in the term calendar. The presumption is that the judgment entered by Long was directed and authorized by the judge. This presumption is strengthened by the fact that subsequent to the transcribing of the judgment execution had been granted by the judge and summons in garnishment issued. In fact it is not contended that the judgment entered upon the docket was not the one actually pronounced by the court. It follows from the foregoing considerations that the objections made by the appellees to the judgment in favor of Scott against Lanham cannot be sustained, and that the district court erred in its first conclusion of law, in holding said judgment invalid.

We will next consider whether the proceedings in garnishment against Fitzgerald are valid and binding. The record discloses that the indebtedness of Fitzgerald to Lanham had been reduced to judgment. The first question therefore presented is whether a judgment debtor can be garnished. Section 212 of the code provides: "An order of attachment binds the property attached from the time of service, and the garnishee shall be liable to the plaintiff in attachment for all property, moneys, and credits in his hands, or due from him to the defendant, from the time he is served with the written notice mentioned in section two hundred and seven." By section 221 of the code the garnishee is required to "appear and answer under oath all the questions put to him touching the property of every description and credits of the defendants in his possession or under his control, and he shall disclose truly the amount owing by him to the defendant whether due or not, and in case of a corporation any stock therein held by or for the benefit of the defendant, at or after the service of notice." ⁶²⁸ Section 224 reads as follows: "If the garnishee appear and answer, and it is discovered on his examination that at or after the service of the order of attachment and notice upon him he was possessed of any property of the defendant, or was indebted to him, the court may order the delivery of such property and the payment of the amount owing by the garnishee into the court; or the court may per-

mit the garnishee to retain the property or the amount owing, upon the execution of an undertaking to the plaintiff by one or more sufficient sureties to the effect that the amount shall be paid, or the property forthcoming, as the court may direct." It is very evident that the foregoing provisions are sufficiently broad to cover debts reduced to judgment, and that a judgment debtor is liable to the process of garnishment in a suit against the judgment creditor. The statute is susceptible of no other reasonable construction. It does not exempt any credit of any kind whatever. The decided weight of the decisions in this country lays down the broad doctrine that a judgment debtor may be garnished, and we so hold the law to be in this state: *Osborn v. Cloud*, 23 Iowa, 105; 92 Am. Dec. 413; *Gamble v. Central R. R. etc. Co.*, 80 Ga. 595; 12 Am. St. Rep. 276; *Wood v. Lake*, 13 Wis. 94; *Keith v. Harris*, 9 Kan. 387; *Skipper v. Foster*, 29 Ala. 330; 65 Am. Dec. 405; 8 Am. & Eng. Ency. of Law, 1169; Drake on Attachment, 7th ed., sec. 622.

The question presented by the record to be determined is whether a judgment debtor in the district court of this state is liable to garnishment proceedings issued out of the county court. There is an irreconcilable conflict in the authorities bearing upon the subject. Some decisions are to be found in the books which assert that a judgment debtor in one court may be garnished on process issued out of another court: *Luton v. Hoehn*, 72 Ill. 81; *Allen v. Watt*, 79 Ill. 284; *Jones v. New York etc. Ry. Co.*, 1 Grant Cas. 457; *Gager v. Watson*, 11 Conn. 168. The majority of the cases, and the more recent decisions, sustain ⁶²⁹ the doctrine that a debt reduced to a judgment is liable to garnishment when the process of garnishment issues from the same court, but not otherwise: Drake on Attachment, sec. 625; Waples on Attachment and Garnishment, 1st ed., 596; *Wallace v. McConnell*, 13 Pet. 136; *Thomas v. Woolbridge*, 2 Wood, 667; *Henry v. Gold Park Min. Co.*, 5 Mo-Crary, 70; *Franklin v. Ward*, 3 Mason, 136; *American Bank v. Snow*, 9 R. I. 11; 98 Am. Dec. 364; *Burrill v. Letson*, 2 Spears, 378; *American Bank v. Rollins*, 99 Mass. 313; *Perkins v. Guy*, 2 Mont. 16. In Drake on Attachment, section 625, it is said: "However strongly these reasons apply to the case of a garnishment of the judgment debtor in the same court in which the judgment was rendered, their force is lost when the judgment is in one court and the garnishment in another. There a new question springs up, growing out of the conflict

of jurisdiction which at once takes place. Upon what ground can one court assume to nullify in this indirect manner the judgments of another? Clearly, the attempt would be absurd, especially where the two courts were of different jurisdictions or existed under different governments. Take, for example, the case of a court of law attempting to arrest the execution of a decree of a court of equity for the payment of money, by garnishing the defendant; or that of a state court so interfering with a judgment of a federal court, or vice versa; it is not to be supposed that in either case the court rendering the judgment or decree would or should tolerate so violent an encroachment on its prerogatives and jurisdiction." Waples, in his valuable work on Attachment and Garnishment, first edition, 596, says: "It has long been a mooted question whether a judgment debtor can be garnished. It may be considered under two aspects: 1. In relation to the judgment debtor; and 2. In relation to the court rendering the judgment. So far as the former is concerned, there is no reason why he should not be garnished and the ⁶³⁰ judgment debt attached in his hands in the suit against the judgment creditor. He has no cause of complaint when he gets acquittance by paying to another under judicial order what he would otherwise be obliged to pay to his immediate creditor. He would have cause to complain should he be made to pay at a time when such payment would give him no acquittance, or under circumstances which would give him no relief from the judgment. If the judgment against him is in a foreign court or in any court other than that in which he is garnished, he should be discharged upon disclosing the existence of the judgment. This leads to the consideration of the question in relation to the court rendering the judgment. The court, being possessed of jurisdiction, has the exclusive right of effectuating its decree by execution. No other equal tribunal can step before it and say that the judgment debtor must pay to some person other than the judgment creditor, without interfering with the jurisdictional power to execute the judgment rendered. If, however, the attachment suit is brought in the same court that rendered the judgment, there would be no clash of jurisdiction should the attaching creditor be subrogated to the right of the judgment creditor in a suit against the latter. . . . There has been some apparent conflict of opinion upon the question of liability, but nearly all, if not quite all, can be reconciled on

the common ground that a judgment debt may be attached and the judgment debtor garnished in an attachment suit pending against the judgment creditor when it can be done without clash of jurisdiction and without subjecting or endangering the garnishee to double payment; and that such debt cannot be attached when such conflict or injustice would result." In Michigan it has been held that a judgment recovered before one justice of the peace is not subject to proceedings in garnishment before another justice: *Sievers v. Woodburn Sarven Wheel Co.*, 43 Mich. 275; *Noyes v. Foster*, 48 Mich. 273; *Custer v. White*, 49 Mich. 262. It ⁶³¹ has likewise been decided that a judgment obtained in the circuit court of a state cannot be garnished before a justice of the peace: *Clodfelter v. Cox*, 1 Sneed, 330; 60 Am. Dec. 157. To allow a judgment to be garnished in a court other than the one in which it was rendered would subject the debtor to a double judgment on a single liability, and thereby subject him to the danger of being compelled to pay the debt twice. Besides, it would permit one court to interfere with the due execution of process in another tribunal. We are unwilling to place a construction upon the statutes that is liable to lead to such results. Upon principle and authority we are constrained to hold that the garnishment proceedings in the county court, in the case of *Scott v. Lanham*, were void, and consequently created no lien upon the fund in controversy.

In the brief of appellant it is said: "All opportunity for conflict of jurisdiction or for injustice has been avoided by the payment of the entire amount of the Lanham judgment into the district court, and the bringing of the equity proceedings in which all parties interested are made defendants, where all the parties can have their rights adjusted. The garnishee can be protected from double payment and his judgment creditor compelled to satisfy the judgment of record." This position might, and doubtless would, be tenable were it not for the fact that Lanham, plaintiff's debtor, assigned his judgment against Fitzgerald to the defendant C. H. Rohman, which assignment was filed in the district court of Lancaster county, according to the fifth finding of fact, on April 10, 1893, several months prior to the institution of this equitable action. Therefore, Lanham had no interest in the judgment or the money paid into court when this action was commenced, and, as we have already shown, the

garnishment proceedings created no lien upon the money in dispute. There is no room to doubt that when a judgment has been assigned, it is not liable thereafter to garnishment at the suit of the creditor of the assignor.

⁶³² The conclusion reached makes it unnecessary to consider the rights of Webster, Rose & Fisherick, and Abbott & Abbott, to liens for services as attorneys. Plaintiff is not prejudiced by the decision of the trial court upon that branch of the case, and Rohman took an assignment of the judgment from Lanham subject to the liens of the above-named attorneys.

The decree of the district court is affirmed.

JUDGMENTS—NECESSITY FOR SIGNATURE OF JUDGE.—The provision of the Iowa statute in relation to signing the entry or record of a judgment by the judge who rendered it is directory merely, and a noncompliance therewith does not invalidate the judgment: *Childs v. McChesney*, 20 Iowa, 431; 89 Am. Dec. 545, and note. A judgment need not be signed by the judge rendering it, and upon his failure to authenticate it during his term of office it may be authenticated by his successor without impairing its effect: *Crim v. Kessing*, 89 Cal. 478; 23 Am. St. Rep. 491. It is not necessary to the validity of a judgment that it should be in writing, signed by the judge: *Estate of Cook*, 77 Cal. 220; 11 Am. St. Rep. 267, and note. The signature of the judge to the journal entry of a judgment offered in evidence is not necessary to its validity: *Ritchie v. Carpenter*, 2 Wash. 512; 26 Am. St. Rep. 877.

JUDGMENTS—ATTACHMENT OF.—Debts reduced to judgments may be attached where the judgment and attachment are in the same court, but such a case must be distinguished from one where the garnishment and attachment are in different courts of the same state: *Skipper v. Foster*, 29 Ala. 330; 65 Am. Dec. 405, and note. See, also, the note to *Burke v. Hance*, 18 Am. St. Rep. 33.

JUDGMENTS—ASSIGNMENT—GARNISHMENT.—Where a judgment creditor assigns a judgment, and the judgment debtor, without notice of the assignment, afterward pays the amount thereof voluntarily to the sheriff upon being served with garnishee process, the rights of the assignee are not affected, and he may still enforce the judgment: *Brown v. Ayres*, 33 Cal. 525; 91 Am. Dec. 655, and note. The assignment of a judgment is effective to vest the title to it in the assignee, so as to defeat a subsequent garnishment of the judgment debtor by a creditor of the assignor having no notice of the assignment before service of the garnishment: *Schoofield v. Hiram*, 71 Miss. 55; 42 Am. St. Rep. 450.

CHAPMAN v. BREWER.

[43 NEBRASKA, 800.]

MECHANICS' LIENS.—A STATEMENT in a claim for a mechanic's lien need not disclose the dates of the performance of labor or furnishing material where it appears that such performance or furnishing was within the time required by law to entitle the claimant to a lien. It is sufficient to show when the last labor was done or the last material furnished.

MECHANIC'S LIEN AND MORTGAGE—CONFLICT BETWEEN.—One taking a mortgage on realty is bound to know whether material has been furnished or labor performed in the erection, repair, or removal of improvements thereon, and the mortgage is subject to the lien for materials commenced to be furnished or labor commenced to be performed prior to its execution.

MECHANIC'S LIEN—MISTAKE, EVIDENCE TO CORRECT.—The statement in a claim for a mechanic's lien that the commencement to furnish material or perform labor was in December, when it was in fact in November, may, by parol evidence, be shown to be incorrect, and the lien to be made to relate to the true date of such commencement.

A MECHANIC'S LIEN MAY BE VERIFIED by an agent of the corporation upon his information and belief.

A MECHANIC'S LIEN MAY BE ACQUIRED BY A CORPORATION, whether domestic or foreign, under a statute providing for a lien in favor of any person.

A CORPORATION, WHETHER FOREIGN OR DOMESTIC, MAY ACQUIRE AND ENFORCE A MECHANIC'S LIEN under a statute conferring the right to such lien upon any person.

CONFLICT OF LAWS.—In the absence of proof the statutory law of another state is presumed to be as in this.

MECHANIC'S LIEN.—THE VERIFICATION OF A CLAIM BY A PERSON who appears by his oath to be the book-keeper and treasurer, and a member of the company in whose behalf the claim is made, is made by the proper person.

A MECHANIC'S LIEN IS NOT WAIVED BY THE TAKING OF A NOTE AND MORTGAGE for the amount of the debt unless they are accepted in payment, or looked upon and treated by the parties as a waiver of the right to claim a lien, or it would be inequitable, as between the parties, to permit the holding of the additional security and also the enforcement of the lien.

MECHANIC'S LIEN.—THE TAKING OF A MORTGAGE ON THE SAME PROPERTY UPON WHICH THE CREDITOR CLAIMS A STATUTORY LIEN does not necessarily waive or displace the lien. The mortgage may be regarded as cumulative security.

MECHANIC'S LIEN IS NOT WAIVED BY A STIPULATION in the agreement for the furnishing of material or the performing of labor that the person furnishing or performing it shall have a lien upon all fixtures, machinery, etc., and real estate where such machinery is placed, where there is nothing more definite in the contract as to the nature and extent of the lien thus contracted for.

A MECHANIC'S LIEN IS NOT WAIVED by the fact that the person furnishing material has or reserves a vendor's lien thereon

E. E. Byrum, for the appellant.

Miller & Son, B. Ready, Davis, Gantt & Briggs, and A. M. Gooding, for the respondent.

§94 HARRISON, J. This action was instituted in the district court of Cedar county by the plaintiff, H. T. Chapman, to foreclose a real estate mortgage executed and delivered to him by Isaac and Lucinda Brewer upon property described in the petition, situated in Cedar county. The other parties made defendants to the action in addition to the Brewers were the Cedar County Bank and the Des Moines Manufacturing and Supply Company. The defendant company answered, and filed a cross-bill, in which it claimed a mechanic's lien prior in point of time to either of the mortgages. The Cedar County Bank filed an answer or cross-petition setting up a lien by mortgage executed and delivered to it by the Brewers, claiming it to be second and subsequent only to plaintiff's mortgage. Plaintiff filed a reply to the answer and cross-petition of the company, by which was raised the question of the priority of the mechanic's lien of the company. Upon trial the court determined and adjudged that the liens of the plaintiff and Cedar County Bank were prior and superior to that of the company, and from this decree the company has appealed to this court.

In the original claim of lien filed, which was introduced in evidence, there appears the following statement: "That on and between the thirtieth day of December, 1889, and the twenty-fifth day of January, 1890, they furnished lumber and materials and machinery supplies and labor for said building," etc. The mortgage to Chapman was dated November 15, 1889, and recorded November 21, 1889, and the mortgage of the Cedar County Bank was dated §95 November 15, 1889, and recorded November 27, 1889. In the answer or cross-petition of the Des Moines Manufacturing and Supply Company it was stated that work was commenced November 5, 1889, in and on the mill by a party sent by it from Des Moines for such purpose, and the proof shows that work was so commenced by their workman, Morris, on the 5th or 7th of November, 1889, and that some of the material was furnished during the month of October immediately preceding. In the bill or statement of account attached to the claim of lien there is, of date December 31, 1889, an item of charge in the following words, viz.: "50 days by Morris to Dec. 31, '89, @ \$4, \$200." It is strenuously argued that the company is bound by the statement in the claim filed in reference to the dates between which the labor was performed and material furnished, and that the evidence introduced of a differ-

ent and earlier date of the commencement of such labor, etc., was incompetent, and could not be received to vary or change the date assigned in the claim as it appeared of record. It may be well, in order to fully and properly understand the situation of the parties, to state here that the claim of lien was filed March 17, 1890. The statute of this state in regard to mechanics' liens is as follows: "Any person entitled to a lien under this chapter shall make an account, in writing, of the items of labor, skill, machinery, or material furnished, or either of them, as the case may be, and, after making oath thereto, shall, within four months of the time of performing such labor and skill, or furnishing such machinery or material, file the same in the office of the register of deeds," etc., and does not require that the dates of performance of labor or furnishing material shall be stated in the claim for lien; and where it appears from the affidavit filed and the accompanying account of labor or material that such performance and furnishing were within the time required by the law to entitle the claimant to a lien, it is sufficient. The lien papers in this case disclose that ⁸⁹⁶ the last labor was performed or material furnished January 25, 1890, and the claim filed March 17th of the same year. This fulfilled the requirement of the statute. In *Noll v. Kenneally*, 37 Neb. 879, this court stated the rule to be as follows: "The failure of an account filed to secure a mechanic's lien to state the dates the various items of materials were furnished will not vitiate the lien if it appears from the account and affidavit thereto attached that such materials were furnished within the requisite time to entitle the claimant to a lien therefor." In *Henry etc. Co. v. Fisher*, 37 Neb. 207, it was held: "A party taking a mortgage on real estate is bound, at the time, to know whether material has been furnished or labor performed in the erection, reparation, or removal of improvements on the premises within the four prior months"; and further, "the lien of a mortgage on real estate, taken while a building is in process of erection thereon, is subject to the claims of materialmen and laborers for material already and thereafter furnished and for labor already and thereafter performed, in the erection of such building, when the commencement of the performance of such labor was prior to the record of said mortgage." Applying the rules of law as announced by this court, just quoted, to the facts in the case at bar, and further bearing in mind that by the provisions of our statute on the

subject under discussion the lien attaches at the commencement of the labor or furnishing material, and the relative positions of the liens involved are not, in so far as they are governed by their respective dates, very difficult to ascertain or of assignment. The fact that the date of the commencement of labor or furnishing of material was stated to be December 30, 1889, when it should have been November 5th or 7th, could not, and did not, have any significance for or to mortgage lien-holders, or in any manner affect their rights under the mortgages executed during the month of November, at a time ⁸⁹⁷ when the work and furnishing which were the foundation of the lien were in progress, and had been from a date prior to such execution, as they were bound to take notice of these things, and their mortgages were taken subject to any rights of lien which had accrued or attached in favor of mechanics or materialmen. Their rights were acquired long prior to the time the statement was filed in which appeared the erroneous date, and such statement was not notice to them, nor could or were their liens or rights in any way affected by it, and the evidence of the true date was competent and its reception in no manner or extent harmful or prejudicial to the parties holding the mortgages: 2 Jones on Liens, sec. 1066; *Wakefield v. Latey*, 39 Neb. 285.

It is argued that it appears upon the face of the original claim of lien, filed by appellant, which was introduced in evidence, that the claim was verified before Gardner V. Wright, a notary public, and who was secretary of the appellant company, and also shown by the articles of incorporation to be a stockholder therein and thus directly interested, and that being so interested he was incompetent to administer the oath to the party verifying the lien. However this may be, it was not, we think, sufficiently raised by the pleadings, and was evidently not an issue in the trial court, and cannot be considered in this court. It is further urged that the verification of the claim of lien was upon information and belief, and that it should have been sworn to positively to fulfill the requirements of our statutory provisions in regard to the verification of a claim for a mechanic's lien. Such has been stated to be the rule in Kansas, under a statute very similar in its exactions in this respect to our own: *Dorman v. Crozier*, 14 Kan. 224. See, also, *Globe etc. Co. v. Thacher*, 87 Ala. 458. But this court, in construing the provisions of the mechanic's lien law, has invariably announced and adhered

to the doctrine that they must be given a liberal construction, agreeably to which it ^{see} has been held that the oath may be made by an agent: See *Great Western Mfg. Co. v. Hunter*, 15 Neb. 33. And in a case such as is the one now under consideration, where the oath must necessarily be made by some one for the corporation, and whose only knowledge of the transaction from which the claim for lien arises is from the inherent nature of the business, derived from information, and very frequently may not be personal or direct, it would seem very proper to apply the rule of liberal construction, and that an oath made upon information and belief must be adjudged a compliance with the requirements of the mechanic's lien statute, wherein it states that the claim for lien should be filed "after making oath thereto," and is a "making oath thereto" within these words when liberally construed. Nor are we without authority to support such views. In Missouri, where the statute provides, referring to the claim for lien, "which shall in all cases be verified by the oath of himself or some credible person for him" (Mo. Rev. Stats. 1889, sec. 6709), it was held, in the case of *Finley v. West*, 51 Mo. App. 569, that "an affidavit on belief of the affiant is a substantial compliance with the lien law": See, also, Phillips on Mechanics' Liens, sec. 366 a.

Another contention is that our statute provides for a lien in favor of "any person" and not in favor of a corporation, and that a corporation cannot acquire a lien under our statutes. "Persons also are divided by the law into either natural persons or artificial. Natural persons are such as the God of nature formed us. Artificial are such as are created and devised by human laws for the purposes of society and government, which are called corporations or bodies politic": 1 Blackstone's Commentaries, 123. "Enactments which related to persons would be variously understood, according to the circumstances under which they were used, as including or not including corporations. In its legal significance it is said the word 'person' is a generic term, and as such, *prima facie*, includes artificial as ^{see} well as natural persons, unless the language indicates that it is used in a more restricted sense"; and further: "If any general rule can be drawn from the decisions, it would be this: that where the act imposes a duty toward or for the protection of the public or individuals, grants a right properly common to all, and from participation in which the limited character of corporate franchises and the

absence of any natural rights in corporations do not, by any policy of the law, debar them, the term 'persons' will, in general, include them whether the act be a penal or a remedial one": See Endlich on Interpretation of Statutes, secs. 87, 89, and cases cited. We are satisfied that the word "persons" in our mechanic's lien law includes an artificial person or corporation.

It is further insisted, and very strenuously, and we will discuss it here, for it is directly connected with and is a branch of the subject last considered, i. e., the right of a corporation to file and hold a lien, that the appellant company was a foreign corporation, and if it should be decided that a home or domestic corporation could acquire or possess a mechanic's lien, it would not extend to and include a foreign corporation as competent to do so. There are authorities to the effect that wherever corporations are embodied under the term "persons" it will be construed to embody only such as are formed under the laws of the state enacting the statute so construed; but we do not believe it was the intention of our legislature in the use of the words "any person" to restrict their meaning, but they were used in their largest and most extended sense and meaning, and to include both foreign and home corporations as well as natural persons. There was a denial of the corporate existence of appellant company, and it is contended that there was no sufficient proof of the corporation. The articles of incorporation, signed by the incorporators and acknowledged before a notary public, and showing, by indorsement thereon, to have been filed and ~~and~~ recorded in the office of the recorder of Polk county, Iowa, and also filed and recorded in the office of the secretary of state of Iowa, were introduced in evidence, and proof was made of the use of the corporate rights and powers by the company and its engagement in business for a considerable length of time. There was also offered and received in evidence what purported to be a copy of the statutes of the state of Iowa, but it was not sufficiently identified to make it competent under the rule governing the introduction of such testimony in our state, but in the absence of proof the statutory law of the state of Iowa, in relation to the subject involved, i. e., the creation of a corporation, must be presumed to be the same as ours: *Scroggin v. McClelland*, 37 Neb. 644; 40 Am. St. Rep. 520. This being true, there was proof which established the existence of at least a *de facto* corporation, or such a one that its existence

could not be collaterally attacked. It may be added here that if the proof of the corporate capacity of the corporation was insufficient or failed, the appellee, after denying such fact, alleged affirmatively that the company could not hold a mechanic's lien for the reason that it was a foreign corporation. This, we think, should be treated as an admission of the corporate existence of the company.

The objection was made that the party making oath to the lien was not a competent party to do so. D. H. Buxton, who verified the claim, states on his oath that he is the book-keeper and treasurer, a member of the firm of Des Moines Manufacturing and Supply Company. Of the articles of incorporation of appellant company the tenth states that "no person shall be elected director or officer of this corporation who is not a stockholder." From all the foregoing it appears that the person who made the oath to the claim of lien was an officer of the company, and presumably, in accordance with the requirements of article 10 above quoted, a stockholder, and, moreover, the book-keeper of the company whose claim of lien he verified. We think ^{see} this constituted him competent to make the necessary oath to the claim of lien, and when he had done so it was valid and sufficiently verified to meet the objection that it was not verified by a person who was a proper person to make oath to it for the company.

It appears that the appellant company received notes for the balance due it under its contract for furnishing the material and performing the labor upon the mill, and that these notes were secured by a mortgage upon the mill property, and the mortgage also covered other property. By so doing, it is claimed, it waived its right and lien under the lien law. The notes and mortgage were taken as security, and were not, so far as the record disclosed, delivered as payment of the claim or account, or accepted as such, or as in lieu of the lien, or looked upon or treated as a waiver of the lien or right to file the same.

In the case of the *Great Western Mfg. Co. v. Hunter*, 15 Neb. 32, it was held: "The contract for furnishing certain machinery for a grain elevator contained a clause as follows, in substance: 'Should shipment be made before payment in full, the title, right of possession, and ownership of the aforesaid machinery shall remain in the above first party until the note is paid,' etc. Held, not a waiver of a right to a mechanic's lien"; and in the case of *Hoagland v. Lusk*, 33

Neb. 376, 29 Am. St. Rep. 485, the rule was stated to be: "The acceptance by a materialman of a note and chattel mortgage as collateral security for materials previously furnished for the erection of a building under a contract with the owner is not a waiver of the lien of the materialman, unless such was the intention of the parties." In the text of the opinion is the following statement: "In January the firm of Lusk Bros. & Co. failed. At that time the plaintiff took a note, executed by William S. Lusk, secured by chattel mortgage on some potatoes, as collateral security of the plaintiff's claim. The potatoes were subsequently sold under the mortgage, and the proceeds applied toward the payment of the plaintiff's ⁹⁰² demand. The note and chattel mortgage were not accepted by the plaintiff as payment, but simply as additional and collateral security, without any intention to waive the lien given by statute. The taking of the security did not affect the lien. Upon the proposition there is an irreconcilable conflict in the authorities. The rule which we have stated is, we think, sustained by the better reason: *Ford v. Wilson*, 85 Ga. 109; *Howe v. Kindred*, 42 Minn. 433; *Hinchman v. Lybrand*, 14 Serg. & R. 32; *Montandon v. Deas*, 14 Ala. 33; 48 Am. Dec. 84." See, also, *Smith v. Parsons*, 37 Neb. 677; *Kilpatrick v. Kansas City etc. R. R. Co.*, 38 Neb. 621; 41 Am. St. Rep. 741; *Union Stock Yards State Bank v. Baker*, 42 Neb. 880; *Smith & Vaile Co. v. Butts*, 16 South. Rep. 242 (Miss., Oct. 15, 1894).

We gather from the opinions of this court, in which the subject of the lienor accepting other security than the lien allowed by statute has been discussed, that this court is committed to the doctrine that it is not a waiver of the statutory lien unless it appears that such was the intention, or, from the facts of the case, that it would be inequitable, as between the parties, to permit the holding of the further security and also the existence of the lien. We are aware that it has been held that if the party take a mortgage upon the same property upon which the statutory lien is claimed, it is a waiver of the lien, or if it has been perfected by filing, etc., will displace it. In the decisions which we have examined in which the rule is so announced, the reason given or shown by the facts of the case for the doctrine was, that other lien-holders had become such by relying upon the record as showing the relations of the other parties, and to permit the mechanic or materialman who had taken the mortgage to

assert the right to the statutory lien would prejudice the rights so acquired. In the case at bar this can have no application or relevancy. It will be remembered that the appellees (mortgagees) received their mortgages after the company's rights to a lien had attached, and ²⁰³ with notice of such right, or that they were required to take notice of it. They took their mortgages charged with notice of the appellant's right of lien and subject thereto, and as the company's mortgage was not in existence until long after theirs had been executed and recorded, the fact that it was made could in no manner affect them or their rights under their mortgages, and that it was created or had an existence did not or could not alter or vary the positions of their mortgage liens with reference to the appellant's statutory lien, or, as to it, either advance or displace them, and we cannot see wherein they can be prejudiced or an injustice done to them or their rights by permitting appellant to enforce its statutory lien, or wherein the execution and delivery of the mortgage to appellant so affected their liens or rights as entitled them to assert that it was a waiver of the other lien; and, furthermore, as there is nothing in the case which shows, or from which it can rightfully be inferred, that the mortgage was accepted as payment, or which evinced an intention that it was to take the place or to be instead of the statutory lien, or displace it, we conclude that the lien, as to this objection, must be upheld, and was not waived by taking the subsequent mortgage, or thereby rendered incapable of enforcement. In Jones on Liens, section 1013, the rule is stated to be: "The taking of a mortgage upon the same property upon which the creditor claims a statutory lien may not displace the lien. The mortgage is regarded as a cumulative security, and the creditor may enforce either the lien or the mortgage. So, also, the taking of the collateral obligation of another person for the payment of the lien debt does not ordinarily debar the lien-holder from claiming the security of his lien, unless the circumstances are such that an intention to waive the lien may reasonably be inferred": *Payne v. Wilson*, 74 N. Y. 348. In *Howe v. Kindred*, 42 Minn. 433, we find the following statement: "The reason usually given in the adjudicated cases for holding that a mechanic ²⁰⁴ or materialman has lost his lien by taking security, either upon the property to which the lien attaches or upon other property,

is that subsequent lien-holders and purchasers have a right to rely upon the record, and should be protected against secret liens. . . . This reason is without force in the case at bar. The appellant took his mortgage long prior to any of the acts relied upon by him as constituting an extinguishment of the lien; and, when taken, it was subject to plaintiff's right to perfect a claim already attached to the premises. His situation has never been changed by anything plaintiffs may have done." In *Gilcrest v. Gottschalk*, 39 Iowa, 311, it is said: "It seems to us that the taking of a mortgage from the debtor upon the same identical property covered by the mechanic's lien, and for the same debt, cannot be deemed collateral security on the same contract. There is nothing in the record to show that the mortgage was intended and accepted as collateral security. It was not such unless so intended and accepted: See 1 Bouvier's Law Dictionary, 240; Powell on Mortgages, 893. The mechanic or materialman will retain his lien unless he does something evincing an intention to rely upon his new or collateral security, and not upon the lien the law has given him: *Clark v. Hunt*, 3 J. J. Marsh. 558."

It was stated in a written contract between the company and Isaac Brewer, pursuant to the terms of which the material, etc., was furnished for which the company claimed its lien, that " — agrees that said Des Moines Manufacturing and Supply Company shall have a lien upon all the machinery, fixtures, etc., herein mentioned, and upon the building and real estate where said machinery is placed, to secure all claims of said company," and it is urged that by accepting or becoming a party to the contract with the above clause in it the company waived its right to a lien under the mechanic's lien law. The above agreement for a lien, if such it may be called, is a triumph of indefiniteness. It mentions ²⁰⁵ no kind of a lien, and no mention is made of whether one will be created in the future or whether it is to attach at the time of the execution of the contract or at some time during the progress of the labor or furnishing of material. It cannot be determined from its terms whether the parties viewed it as establishing a lien or as a mere statement that a mortgage would be executed at some subsequent date, and it does not appear that the appellees had it in view when they acquired their mortgage liens, or that their actions in taking the mortgages were in any manner or to any degree

governed or affected by it; nor does it appear from the facts and circumstances of the case that when the contract was made there was any intention to waive the right of a lien under the statute or to accept what was given or to be given, as expressed in the contract, in lieu of the statutory lien. We do not think there was any waiver of the right to a lien by reason of the statement hereinbefore quoted, which appeared in the contract. In *Great Western Mfg. Co. v. Hunter*, 15 Neb. 82, it is said: "As to the third subdivision of this point, that plaintiffs cannot have a mechanic's lien for the machinery furnished, for the reason that by the terms of the contract they retained a vendor's lien on the machinery, while I find some difficulties presented in some of the cases cited, yet, as it is a general principle of law that a creditor may have as many securities for his debt as he can obtain without infringing upon the rights of others, and as the rights of no other person have been by any possibility affected by the said clause in the contract, I do not deem it as an objection to the plaintiff's right to a lien." The appellant's lien was the prior and superior one, and the decree of the district court must be reversed wherein it declared it inferior and subsequent to the mortgage liens, and a decree entered in this court establishing its priority.

Decree accordingly.

MECHANIC'S LIEN — PRIORITY BETWEEN AND MORTGAGE.—A lien for labor or material is paramount to the lien of a mortgage executed after the building was commenced, but before such labor or material was furnished: *Haxton etc. Heater Co. v. Gordon*, 2 N. Dak. 246; 33 Am. St. Rep. 776, and note. The lien of a mortgage for the purchase price of land cannot be postponed or displaced by a mechanic's lien for materials furnished for a building thereon which attaches simultaneously with the acquisition of title by the mortgagor and the execution of the mortgage: *Russell v. Grant*, 122 Mo. 161; 43 Am. St. Rep. 563, and note. See, further, the extended note to *Kilpatrick v. Kansas City etc. R. R. Co.*, 41 Am. St. Rep. 758.

MECHANIC'S LIEN — WAIVER BY TAKING NOTE OR MORTGAGE.—A mechanic's lien is not waived by taking a note for the amount due thereunder, and giving the debtor a receipt in full, unless such was the intention of the parties: *Hoagland v. Lusk*, 33 Neb. 376; 29 Am. St. Rep. 485, and note. A mechanic's lien is waived by the lienor's acceptance of a mortgage on such property for the amount due on such lien: *Trullinger v. Kefted*, 7 Or. 228; 33 Am. Rep. 708. This question is fully discussed in the extended notes to *Kilpatrick v. Kansas City etc. R. R. Co.*, 41 Am. St. Rep. 764, and *Goble v. Gale*, 41 Am. Dec. 223.

MECHANIC'S LIEN.—WAIVER BY ACCEPTANCE OF VENDOR'S LIEN is discussed in the extended note to *Goble v. Gale*, 41 Am. Dec. 223.

EVIDENCE—PRESUMPTION AS TO LAWS OF ANOTHER STATE.—In the absence of proof the court will presume that the laws of another state are the same as this: *Scroggin v. McClelland*, 37 Neb. 644; 40 Am. St. Rep. 520; *Wickersham v. Johnson*, 104 Cal. 407; 43 Am. St. Rep. 118; *Thomas v. Pennington*, 1 S. Dak. 150; 36 Am. St. Rep. 726, and note; *German Bank v. American etc. Ins. Co.*, 83 Iowa, 491; 22 Am. St. Rep. 316, and note.

CASES
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

SPRINGER v. SHAVENDER.

[116 NORTH CAROLINA, 12.]

JUDGMENTS—COLLATERAL ATTACK.—Although mere irregularities in the conduct of a proceeding do not subject the decree rendered therein to a collateral, or even under some circumstances to a direct, attack, yet when the allegations in the pleadings that are essential to the jurisdiction of the court are untrue, and if the truth had appeared upon the record it would have been the duty of the court to have dismissed the suit for want of jurisdiction, the proceedings therein are subject to collateral attack.

JUDGMENTS—COLLATERAL ATTACK—ADMINISTRATION OF PROPERTY OF LIVING PERSON.—Although the children of a person, under a misapprehension of facts, admit an allegation in a proceeding for the sale of their ancestor's land by his administrator that he is dead, and submit to a decree for the sale of the land, yet they may impeach such decree in a collateral proceeding, and avoid the estoppel of title derived through it by showing that their ancestor was living at the date of the decree.

EXECUTORS AND ADMINISTRATORS—ADMINISTRATION ON PROPERTY OF LIVING PERSON.—The appointment of an administrator upon the estate of a living person is void for all purposes.

TRIAL—DISCRETION IN SUBMISSION OF ISSUES.—It is within the discretion of the trial court to submit specific issues arising out of the general issue to the jury, instead of submitting those which are more general.

TRESPASS for cutting trees and removing timber from land.

W. B. Rodman and J. H. Small, for the appellants.

C. F. Warren and J. W. Hinsdale, for the appellees.

15 **AVERY, J.** The question that confronts us at the threshold of this investigation is one that, as we think, has been heretofore in effect passed upon by this and other appellate

courts, but one which requires careful consideration and discussion. Where the children of a person, under a misapprehension of the facts, admitted the allegation of a petition that their ancestor was dead, and submitted to a decree for the sale of his land by his administrator for assets, will they be allowed collaterally to impeach such judgment, and avoid the estoppel of title derived through it, by showing that the ancestor was at the date of the decree actually living? It is quite as important that courts of inferior jurisdiction should command the confidence of the public in the regularity and binding force of their decrees, upon which titles depend for their validity, as that appellate courts should be trusted to adhere to decisions upon the stability of which rights of property depend. But while mere irregularities in the conduct of a proceeding will not subject the decree rendered therein to a collateral, or even under some circumstances to a direct, attack, the rule is different when the allegations in the pleadings that are essential to the jurisdiction of the court are untrue, and where, if the truth had appeared upon the record, it would have become the duty of the court on motion or *ex mero motu* to declare the suit *coram non judice*. If, in the special proceeding under discussion, it had appeared that G. W. Dixon was alive, or had not been admitted that he was dead, the very basis of the jurisdiction would have been wanting, and there would have been no serious controversy as to the duty of the court to pronounce the judgment a nullity, even when assailed collaterally only: Black on Judgments, secs. 215, 242, 278. The same effect must be given to proof aliunde, after the decree is entered, that the person supposed to be dead was in fact alive: *London v. Wilmington etc. R. R. Co.*, 88 N. C. 584; *State v. White*, 7 Ired. 117; Book of Monographs (void judicial sales), 20; *Withers v. Patterson*, 27 Tex. 497; 86 Am. Dec. 643; *Beckett v. Selover*, 7 Cal. 237; 68 Am. Dec. 237; *Duncan v. Stewart*, 25 Ala. 408; 60 Am. Dec. 527; *Griffith v. Frazier*, 8 Cranch, 10, 22; *Fisk v. Norvell*, 9 Tex. 13; 58 Am. Rep. 128; 1 Herman on Executions, 378; *Jochumsen v. Suffolk Sav. Bank*, 3 Allen, 87; *Johnson v. Beazley*, 65 Mo. 250; 27 Am. Rep. 285; *Thomas v. People*, 107 Ill. 517; 47 Am. Rep. 458; *Melia v. Simmons*, 45 Wis. 334; 30 Am. Rep. 746; *Morgan v. Dodge*, 44 N. H. 259; 82 Am. Dec. 213; Black on Judgments, secs. 218-220.

In the case of *Hyman v. Gaskins*, 5 Ired. 272-275, Nash, J.,

discusses at length the distinction between such probate judgments as are declared merely voidable, because the court or ordinary had the right to act but did not comply with the requirements of the law, and such as are void, because the court had no authority to act. While the learned judge did not have occasion then to pass directly upon the effect as an estoppel of administering upon the estate of a person before his death, he cited the case of *Griffith v. Frazier*, 8 Cranch, 10, as one in which Chief Justice Marshall had "had occasion to examine the doctrine of void and voidable letters of administration in his usual clear and forcible manner." In the case referred to, the learned chief justice had said: "But suppose administration to have been granted on the estate of a person not really dead. The act, all will admit, is totally void. Yet the ordinary must always inquire and decide whether the person whose estate is to be committed to the care of others be dead or in life. It is a branch of every case in which letters of administration issue. Yet the decision of the ordinary that the person for whose estate he acts is dead, if the fact be otherwise, does not invest the person he may appoint with the character or powers of an administrator. The case in truth was not one within his jurisdiction. ¹⁷ It was not one in which he had a right to deliberate. It was not committed to him by law. And although one of the points occurs in all cases proper for his tribunal, yet that point cannot bring the subject within his jurisdiction."

But this court in a later case (*State v. White*, 7 Ired. 117) held that an action could not be maintained upon an administrator's bond where it was shown that the supposed decedent was in fact alive when administration was granted upon his estate. The decision rested upon the ground that the probate court had no authority, as the agent of the state, to take charge of the property of a person then living, or to take the bond sued upon. This case was cited arguendo and approved by Smith, C. J., in *London v. Wilmington etc. R. R. Co.*, 88 N. C. 584.

The court, it is true, has held that where there is a decedent, the acts of an administrator who was not entitled to the appointment under the statute are valid, but that the order appointing such person is voidable in a direct proceeding instituted by those having a superior right: *Garrison v. Cox*, 95 N. C. 353; *Atkins v. McCormick*, 4 Jones, 274. This

ruling rests upon the doctrine that in such cases the essential basis of jurisdiction exists, there being a decedent and an estate to be administered. The appointment of the wrong person is but an irregularity, subjecting the order of appointment to direct attack, but not invalidating acts done in pursuance of the law, in the course of administration by him who has been inducted into the place by mistake: *McPherson v. Cunliff*, 11 Serg. & R. 422; 14 Am. Dec. 642; *Devlen v. Commonwealth*, 101 Pa. St. 273; 47 Am. Rep. 710; *Johnson v. Beazley*, 65 Mo. 250; 27 Am. Rep. 276. In the case last cited the supreme court of Missouri quote the language of Judge Redfield, that the holding of the court of appeals of New York, in the case of *Roderigas v. East River Savings Inst.*, 63 N. Y. 460, 20 Am. Rep. 555, that the appointment of an administrator ¹⁸ upon the estate of a living man could not be attacked collaterally, was "without precedent either in English or American jurisprudence." But it seems that in a later case (*Roderigas v. East River Savings Inst.*, 76 N. Y. 318; 32 Am. Rep. 309), Chief Justice Church, admitting that the authorities at common law were uniformly in conflict with it, rested his apparently reluctant approval of the former case upon the ground that it was founded upon a construction of a statute. The appointment of an administrator upon the estate of a living man is void for all purposes, and everything that is founded upon it is a nullity, because there was no jurisdiction. "It must always be remembered," says Black (2 Black on Judgments, sec. 633) "that in order to the conclusiveness of a probate decree, or in the case of sentence emanating from any other tribunal, it is absolutely necessary that the court should have possessed jurisdiction": 1 Herman on Estoppel, sec. 411. The finding by the clerk in a proceeding that was *coram non judice*, because it was founded upon the false basis of jurisdiction that G. W. Dixon was dead, does not preclude the heirs at law from showing that he was alive. To make it conclusive the judgment must be rendered by a court of competent jurisdiction: *Roulhac v. Brown*, 87 N. C. 1; and to give the court authority, its jurisdiction must extend both to the parties and the subject matter: *Condry v. Cheshire*, 88 N. C. 375; *Morris v. Gentry*, 89 N. C. 248; 1 Black on Judgments, sec. 218. We know of no principle upon which the judgment, void as to G. W. Dixon if he were a party to this action, for want of jurisdiction of the subject matter, could be held valid without jurisdiction either against the

parties to the proceeding or those in privity with them. The court did not have jurisdiction of the estate of Dixon if he was at the time living, and it was not error to submit this question to the jury. Should a case be presented where ¹⁹ administration had been granted not upon false information of a person's death, but upon a presumption of law arising from his absence without being heard from for seven years, a different question might be presented. Whether the acts of an administrator who proceeded honestly upon a presumption, to which the law gave the force of a fact, will not be held, because of such presumption, to be valid, as in some courts has been the decision, where an executor performed a part of his imposed trust under a will afterward ascertained to be a forgery, we need not now determine. To exclude a conclusion it may be best, however, to announce that should such a case arise the question whether it is to be governed by or distinguished from the ruling in that before us is an open one. Such a case would raise the point whether the presumption of law that one is dead does not confer jurisdiction over a living person's estate, when it could not possibly be acquired in the absence of such presumption.

It was admitted that Mrs. Matilda E. Dixon, wife of G. W. Dixon, was not a party to the proceeding, and it would of course follow that she was not bound by the decree upon other grounds than those relied upon by the heirs at law: *Condry v. Cheshire*, 88 N. C. 375.

The court submitted an issue involving the question whether G. W. Dixon was living when the proceeding was instituted and when the decree therein was rendered, and it was answered by the jury in the affirmative. This was one of the questions that grew out of the general issue of title raised in the pleadings, and it has been repeatedly decided by this court, beginning with *Emery v. Raleigh etc. R. R. Co.*, 102 N. C. 209, 11 Am. St. Rep. 727, that it is within the discretion of the presiding judge to determine whether he will submit such specific issues, or only those that are more general.

There was no exception to the competency of the testimony ²⁰ bearing on that issue, except the general one, made to the competency of Surat's deposition, that the defendants were estopped by the decree in the special proceeding from denying the title under it, with the consequences, if the position had been well taken, that it would be immaterial whether

he was in fact living, as Susan testified he was after the date of the sale under the decree, or dead. But, now that we have held that neither the heirs at law nor the defendant, if in privity with them, are concluded, it seems to us that the finding upon the first issue defeats the plaintiffs' right to recover in any aspect of the evidence. There was no evidence offered on either side tending to show a forcible trespass on the part of the defendants, and it was not error, therefore, to instruct the jury, as the court did without objection, that the ownership of the timber was dependent upon the title to the land entered upon: *Cohoon v. Simmons*, 7 Ired. 189; *McCormick v. Monroe*, 1 Jones, 13; *Harris v. Sneed*, 104 N. C. 369.

The plaintiffs proposed to show title, as the burden rested upon them to do, not by a regular chain from the state, but by making G. W. Dixon the source of title, and connecting themselves, through the sale and administrator's deed under the decree, to R. C. Windley, and by a string of mesne conveyances with Dixon. They offered other deeds and evidence to connect the defendant with G. W. Dixon as a common source of title, with the view of insisting that plaintiffs' was the older and better title, and that, under the established rule of evidence, the defendants were precluded from denying that fact. If the plaintiffs had succeeded in proving that both derived title from the same source by means of the evidence offered, and that of the two chains so exhibited their own was the better, it would have been as effectual proof of their right against the world as a chain ²¹ extending back to the state, unless the defendants had connected themselves with some other older and better title.

But, since it appears that the proceeding, decree, sale, and deed, by which they propose to show title out of G. W. Dixon, are nullities, the plaintiffs have failed to connect themselves with the alleged source of title, and therefore have failed to establish their right to recover. The judge might have instructed the jury that, if they should find in response to the first issue that Dixon was living at the time of sale under the decree, they would find in response to the second issue that plaintiffs were not the owners (as in that event they would fail to show themselves to be) of any of the land for which they brought suit. In that view of the case, it is not material whether the description in either the plaintiffs' or defendants' deeds was sufficient or insufficient, or whether the

testimony complained of was competent or incompetent, or the charge was erroneous as to matters not involved in or essential to the determination of the controversy. The response to the first issue was necessarily decisive, therefore, of the first six issues. The remaining three grew out of the counterclaim, which the court held that the defendants could not maintain, and the defendants did not appeal.

The plaintiffs have no reason, therefore, to complain of the charge, which was more favorable than they had a right to expect under the view we have taken of the law.

Judgment affirmed.

JUDGMENTS—COLLATERAL ATTACK FOR WANT OF JURISDICTION.—Want of jurisdiction, either of the person or subject matter, appearing upon the face of the record, can be taken advantage of at any time and in any court where the conclusiveness of the decree is the subject of judicial inquiry: *Wall v. Wall*, 123 Pa. St. 545; 10 Am. St. Rep. 549; *Ferguson v. Jones*, 17 Or. 204; 11 Am. St. Rep. 808; *Adams v. Cowles*, 95 Mo. 501; 6 Am. St. Rep. 74. In a collateral proceeding, as between parties and privies, the only contingency in which the judgment of a court of general jurisdiction can be questioned is where the record shows affirmatively that jurisdiction did not attach: *Wilkerson v. Shoonmaker*, 77 Tex. 615; 19 Am. St. Rep. 803, and note. See, also, the notes to *People v. Greene*, 5 Am. St. Rep. 454; *Hardy v. Beaty*, 31 Am. St. Rep. 87; and the extended note to *Morrill v. Morrill*, 23 Am. St. Rep. 116.

EXECUTORS AND ADMINISTRATORS—ADMINISTRATION OF ESTATE OF LIVING PERSON.—Letters of administration on the estate of a living person are absolutely void: Notes to *Scott v. McNeal*, 34 Am. St. Rep. 865; *Moore v. Smith*, 73 Am. Dec. 126; and *Thomas v. People*, 47 Am. Rep. 465. But in *Scott v. McNeal*, 5 Wash. 309, 34 Am. St. Rep. 863, it was held that a probate court has jurisdiction to appoint an administrator for a missing person's estate if the proceedings are based upon a sufficient petition, and proper notice of the hearing thereof is given by publication, and it is satisfactorily proved that such person has not been heard of for more than seven years.

TRIAL—SETTLING ISSUES—DISCRETION OF COURT.—Ordinarily, it must be left to the sound discretion of the trial judge to determine whether to submit specific issues for the purpose of eliciting distinct findings in the nature of a special verdict, or to confine the inquiry to a single issue, or a small number of issues; provided, always, that the issues were raised by the pleadings: *Emery v. Raleigh etc. R. R. Co.*, 102 N. C. 200; 11 Am. St. Rep. 727 and note.

LEAVELL v. WESTERN UNION TELEGRAPH COMPANY.

[116 NORTH CAROLINA, 211.]

TELEGRAPH COMPANIES — INTERSTATE COMMERCE.—Telegraph messages transmitted by a company from and to points within one state, although traversing another state in the route, do not constitute interstate commerce, and are subject to the tariff imposed by the state.

TELEGRAPH COMPANIES — DUTY TO TRANSMIT MESSAGES OVER ITS OWN LINE—EXCESSIVE TARIFF.—If a telegraph company can send a message to its destination over its own line, it cannot, by sending it over the line of another company, exact a tariff of the sender in excess of what it would be allowed to charge for sending it over its own line.

TELEGRAPH COMPANIES MUST HAVE SUFFICIENT FACILITIES to transact all business offered to them at all points at which they have offices.

TELEGRAPH COMPANIES—DISCRIMINATION.—A contract by which a telegraph company gives to a railroad company a preference over its line to the exclusion of others is an illegal discrimination, and does not justify it in exacting an extra tariff for sending a message over the line of another company to a point at which it also has a line.

APPEAL by a telegraph company from a decision of railroad commissioners imposing a penalty for the violation of a prescribed tariff for the transmission of messages.

R. Stiles, for the appellant.

F. I. Osborne, attorney general, for the appellee.

²²⁰ **CLARK, J.** In *Atlantic Express Co. v. Wilmington etc. R. R. Co.*, 111 N. C. 463, 82 Am. St. Rep. 805, this court affirmed the constitutionality of the act (Acts 1891, c. 320) establishing the Railroad and Telegraph Commission. In *Mayo v. Western Union Tel. Co.*, 112 N. C. 343, it sustained the power of such commission, under section 26 of said act, to establish rates for telegraph companies. In *Railroad Commission v. Western Union Tel. Co.*, 113 N. C. 213, the court held that telegraphic messages transmitted by a company from and to points in this state, although traversing another state in the route, do not constitute interstate commerce and are subject to the tariff regulation of the commission. In this it followed the unanimous opinion of the supreme court of the United States, delivered by Fuller, C. J., in *Lehigh Valley R. R. Co. v. Pennsylvania*, 145 U. S. 192. To the same purport, *Campbell v. Chicago etc. Ry. Co.*, 86 Iowa, 587.

In the present case the commission find as a fact that “the defendant has a continuous line by which messages ²²¹ may be transmitted from Wilson to Edenton and other adjacent points in North Carolina, but this line traverses a part of the

state of Virginia, passing through the city of Norfolk"; and it properly holds upon the evidence "that the telegraph office at Edenton is under the control of the defendant, and the operator, though employed by the railroad company, is the agent and operator of the defendant." It necessarily follows from this state of facts that as the defendant could have sent the message the whole distance over its own line it cannot be heard to say that it did not do what it ought to have done, and thus collect fifty cents for the message instead of twenty-five, as allowed by the commission tariff. The defense set up that in fact it only carried the message to Norfolk and then paid another company to forward it to Edenton, cannot be regarded when it might itself have completed the delivery of the message. The defendant seeks to excuse itself on the plea that it has only one wire to Edenton, and that this is fully occupied at that office by the work it does for the railroad company. But it is the duty of the telegraph company to have sufficient facilities to transact all the business offered to it for all points at which it has offices. If the press of business offered is so great that one wire or one operator at a point is not sufficient, it is the duty of the company to add another wire or an additional employee. It is not a mere private business, but a public duty which the defendants by their franchise are authorized to discharge. It is further to be noted that in giving to the railroad company the preference in the use of their line to Edenton, while at other points, as Moyock, Centreville, and Hertford on the same line, the public is admitted to the use of the wire, the defendant is making a forbidden and illegal discrimination in favor of one customer and against the public at large, as was intimated in *Railroad Commission v. Western Union Tel. Co.*, 113 N. C. 226. The findings ³²³ of fact in evidence are fuller, and present a somewhat different and stronger case against the defendant than in Albee's case. By section 11 of the defendant's contract with the railroad company the defendant remains owner of the telegraph line to Edenton, North Carolina, and its belongings, which are to remain "part of its general telegraph system" and "to be controlled and regulated by the telegraph company." Section 3 of the contract gives the railroad messages precedence over commercial business, but stipulates that when railroad business shall require the exclusive use of one wire the telegraph company shall, on sixty days' notice, furnish material for a second wire, which

second wire shall be used for railroad business exclusively and such commercial business as can be done without interfering with railroad business. Section 6 provides that where the railroad company shall open offices, the operators "acting as agents of the telegraph company" shall receive such commercial and public telegrams as may be offered, collecting rates prescribed by the telegraph company, and render monthly statements and pay over the receipts to the telegraph company. Section 7 provides that whenever the volume of business at any point justifies it, the telegraph company shall put in an additional operator. It will be thus seen that the line to Edenton is an integral part of the defendant's general telegraph system. It is only by virtue of its franchise as a telegraph company that it can operate its line to Edenton at all. It cannot discriminate at that point in favor of or against any customer. It cannot subtract itself from obedience to the rates prescribed by the authority of the state, acting through the commission, by a contract giving one customer, the railroad, preference in business, and pleading that such business occupies the only wire it has. The discrimination is itself illegal. Besides, if it were not, the small cost of an additional wire, which it is common ²²³ knowledge does not exceed ten dollars per mile, furnishes no ground to exempt the defendant from furnishing the additional facility to do the business for all. The charge of a double rate between Edenton and other points in North Carolina is a far heavier imposition upon the public than the cost of the additional wire to defendant, and is just the kind of burden and discrimination which the commission was established to prevent. In *Railroad Commission v. Western Union Tel. Co.*, 113 N. C. 213, no commercial message was tendered, and the point now decided was not presented by the record.

The ruling of the commission is in all respects affirmed.

INTERSTATE COMMERCE.—TELEPHONE AND TELEGRAPH MESSAGES are the subject of interstate commerce: *Matter of Pennsylvania Telephone Co.*, 48 N. J. Eq. 91; 27 Am. St. Rep. 462; extended note to *People v. Wemple*, 27 Am. St. Rep. 559.

TELEGRAPH COMPANIES—DUTY TO HAVE SUFFICIENT FACILITIES.—Where a telegraph company has contracted to transmit and deliver a message it cannot excuse its liability for nondelivery on the ground that the business and emoluments of the terminal office were insufficient to justify the employment of an operator or a messenger boy to deliver messages: *Western Union Tel. Co. v. Henderson*, 89 Ala. 510; 18 Am. St. Rep. 148. A telegraph

company cannot avoid liability for failure to deliver a message by showing that the office at the place of delivery was closed at the time when the message was received for transmission: *Western Union Tel. Co. v. Broesche*, 72 Tex. 654; 13 Am. St. Rep. 843. This question is discussed in the extended note to *Western Union Tel. Co. v. Blanchard*, 45 Am. Rep. 487.

CARR v. COKE.

[116 NORTH CAROLINA, 223.]

STATUTES—POWER OF COURTS TO RECEIVE EVIDENCE OF LEGALITY OF ENACTMENT.—The fact that a statute, regular on its face and in due form, is ratified and approved by the genuine signatures of the presiding officers of both houses of the legislature, and deposited in the proper office, is conclusive evidence that it was regularly and legally enacted, and the courts cannot go behind this record for any cause to ascertain from the journals, or otherwise, how such record was established.

F. H. Busbee and Graham, Boone & Boone, for the appellant.

J. B. Batchelor and A. Jones, for the appellee.

223 FAIRCLOTH, C. J. The plaintiff, as a citizen and taxpayer of the state, brings this action against the defendant as secretary of state, who, by virtue of his office, is the custodian of all acts passed by the legislature, or which purport to have been passed, whose duty it is to deliver certified copies of said acts to the public printer for publication. The prayer is that the defendant show cause why a peremptory mandamus shall not issue to compel him to remove the act under consideration from his files, and why he should not be enjoined from delivering a certified copy of the same to the public printer. An act to regulate assignments and other conveyances of like nature in North Carolina, ratified March 13, 1895, is the one under consideration.

The complaint alleges that the act was signed by the president of the senate and the speaker of the house of representatives on the said 13th of March in the presence of each house, and purports to have been ratified upon that day; that, upon information and belief, the act did not become law according to the constitution of the state; that the journals of both houses show that it was not read three times in either; that it was never read in the senate, and was tabled in the house on its second reading; and that by some unknown fraudulent means the bill was enrolled by some person unknown to the plaintiff, and signed by the said president and speaker by mistake.

223 The defendant answered, denying the material allegations.

At the hearing the defendant moved to dismiss the action on the ground that the court had no jurisdiction to grant the relief prayed for by the plaintiff. The motion was heard, and his honor dismissed the action for want of jurisdiction to grant the relief, on the ground that the court cannot go behind the ratification of the act as the same appeared in the office of the secretary of state. With the act before us, on its face regular and in due form, ratified by the genuine signatures of the president of the senate and speaker of the house, the question is presented, Can the court, as a co-ordinate branch of the government, look behind this record and investigate by inquiry and proof the manner in which this record was established by the legislative branch of the government, for any of the causes alleged in the complaint?

It may be stated in the outset that it is an important question and one that has not been heretofore presented directly to this court.

The court cannot be blind to the consequences that will flow from a decision either way. On the one hand, if we cannot look behind the record, then, paid and corrupt men, lobbyists, and other interested ones in and around the legislative halls, will feel more confident and safer in their disreputable work. On the other hand, if we can open the door and permit every act of the legislature to be inquired into, behind the record, for any of the causes alleged in the complaint, then the state will be plagued with all the evils of a veritable Pandora's box. By an examination of the decisions of the courts of the different states, we find some diversity among the decisions and the opinions of eminent jurists. Those courts holding the affirmative of the question as a rule have done so by reason of some provision in **224** their state constitutions or some pre-existing statutes. In one or more states the negative was held, and after a change in their constitutions the reverse was held by reason of some new clause in the organic law.

We find in no state constitution the exact wording as it is in ours. We are therefore left to reason with ourselves, and construe the true meaning of our organic law, aided by the best authorities at our command.

Let it now be understood that it is not a question of fraud or wrongdoing in the legislative halls, as alleged in the com-

plaint, with which we are confronted, but simply a question of power. It cannot be said that this court from its origin until now has ever failed to lay its hands upon fraud or any wrongdoing, whenever authorized by law and requested to do so. If crimes are perpetrated in legislation, the authors are liable, and can be punished as other violators of the law, and possibly a reasonable and honest effort by the proper authorities would bring to light the authors of the wrong, if any has been done. There is now before the court in this proceeding no one who is in the slightest degree alleged or supposed to be connected with wrongdoing in this matter. So, then, we are considering a question of power, and not of investigation behind the record of a co-ordinate branch of the state government.

Our constitution, article 2, section 16, declares that "Each house shall keep a journal of its proceedings which shall be printed and made public immediately after the adjournment of the general assembly," and in section 23, "All bills and resolutions of a legislative nature shall be read three times in each house before they pass into laws; and shall be signed by the presiding officers of both houses." What shall be the entries on the journals is not indicated by the constitution, except as above. It is the province and duty of the court to construe and interpret legislative ^{acts} acts, and see if they disregard or violate any provision of the constitution, and, if so found, to declare them invalid, and this is done upon the face of the act itself. Beyond this duty arises the question of power in the court to look behind the legislative record and inquire into its proceedings for any cause set out in the complaint. Our decision upon this question is based upon the "reason of the thing," upon public policy for the best interests of the state, and upon the decisions of other courts and our own, which commend themselves to our minds, some of which are now cited.

At common law the ratification and approval of an act of parliament was conclusive and unimpeachable, etc. "An act of parliament thus made is the exercise of the highest authority that this kingdom acknowledges upon earth." "And it cannot be altered, amended, dispensed with, suspended, or repealed, but in the same forms and by the same authority of parliament; for it is a maxim in law that it requires the same strength to dissolve as to create an obligation": 1 Blackstone's Commentaries, 185, 186. "The

journal is of good use for the intercourses between the two houses, and the like, but when the act is passed the journal is expired. The journals of parliament are not records, and cannot weaken or control a statute, which is a record and to be tried only by itself": *Rex v. Arundel*, Hob. 109-111, Trinity term, 14 Jac. *Brodnax v. Groom*, 64 N. C. 244, was a question upon a private act requiring thirty days' notice of application, required by article 2, section 4 (now section 12), of the constitution, and the motion was to prove that the notice had not been given. Pearson, C. J., said: "We are of opinion that the ratification certified by the lieutenant governor and the speaker of the house of representatives makes it a 'matter of record,' which cannot be impeached before the courts in a collateral way. Lord Coke says, 'A record ²²⁶ until reversed importeth verity.' There can be no doubt that acts of the legislature, like judgments of courts, are matters of record, and the idea that the verity of the record can be averred against in a collateral proceeding is opposed to all of the authorities. The courts must act on the maxim '*Omnia presumuntur*,' etc. Suppose an act of congress is returned by the president with his objection, and the vice-president and speaker of the house certify that it passed afterward by the constitutional majority, is it open for the courts to go behind the record and hear proof to the contrary?"

In *Scarborough v. Robinson*, 81 N. C. 409, in which this question was not directly before the court, Smith, C. J., in the discussion, uses this language on page 426: "The constitution declares that the legislative, executive, and supreme judicial powers of the government ought to be forever separate and distinct from each other: Const., art. 1, sec. 8. And if the nature and effect of an enrolled bill, duly certified and deposited in the proper office, be such as we have attributed to it, it unavoidably follows that the compulsory order demanded in the action would be an interference with the legitimate exercise of the law-making power, and an obstruction to the harmonious working of the separate and distinct co-ordinate departments of the government, and must, consequently, be denied." We quote this extract in order to show the trend of the judicial mind of the court as then constituted. In *Field v. Clark*, 143 U. S. 649, the question was elaborately argued and considered in an able opinion. The allegation was that an important section in the bill as it

passed was not in the enrolled bill authenticated by the signatures of the speakers and deposited in the office of the secretary of state. After full consideration of the numerous points argued, the court held as follows: "The signing by the speaker and ²³⁷ by the president of the senate, in open session, of an enrolled bill is an official attestation by the two houses of such bill as one that has passed congress; and when the bill thus attested receives the approval of the president and is deposited in the department of state according to law, its authentication as a bill that has passed congress is complete and unimpeachable. It is not competent to show from the journals of either house of congress that an act so authenticated, approved and deposited, did not pass in the precise form in which it was signed by the presiding officers of the two houses and approved by the president."

The argument was pressed that a bill signed by the speaker and approved by the president and deposited with the secretary, as an act, does not become a law if it had not in fact been passed by congress. The court said, in view of the express requirements of the constitution, the correctness of this general principle cannot be doubted. "But," said the court, "this concession of the general principle does not determine the precise question before the court; for it remains to inquire as to the nature of the evidence upon which a court may act, when the issue is made as to whether a bill, asserted to have become a law, was or was not passed by congress. This question is now presented for the first time in this court."

"We cannot be unmindful of the consequences that must result if this court should feel obliged to declare that an enrolled bill, on which depends public and private interests of vast magnitude, which has been duly authenticated by the presiding officers and deposited in the archives as an act of congress, was not in fact passed, and therefore did not become a law": *Field v. Clark*, 143 U. S. 670. Although the constitution does not require that acts of congress shall be authenticated by the speakers' signatures, the court said that "usage, the orderly conduct of legislative proceedings, ²³⁸ and the rules under which the two bodies have acted since the organization of the government, require that mode of authentication," and when a bill is so authenticated "it carries on its face a solemn assurance by the legislative and executive departments that it was passed by congress. The respect due to coequal and independent departments requires the

judicial department to act on that assurance, leaving the courts to determine whether the act so authenticated is in conformity with the constitution." "It is admitted that an enrolled act thus authenticated is sufficient evidence of itself, nothing to the contrary appearing upon its face, that it passed congress": *Field v. Clark*, 143 U. S. 649, 672.

In *Pangborn v. Young*, 32 N. J. L. 29, Beasley, C. J., delivered a strong opinion against the affirmative of the present question, and Judge Harlan says: "The conclusion was that upon grounds of public policy, as well as upon the ancient and well-settled rules of law, a copy of a bill bearing the signatures of the presiding officers of the two houses, and in custody of the secretary of state, was conclusive proof of the enactment and contents of a statute, and could not be contradicted by the legislative journals or in any other mode": *Field v. Clark*, 143 U. S. 674, and other cases.

In *Ex parte Wren*, 63 Miss. 512, 56 Am. Rep. 825, is found a case much in point, in which Campbell, J., in an able and vigorous opinion, said that an enrolled act, such as we are considering, "is the sole exposition of its contents and the conclusive evidence of its existence according to its purport, and it is not allowable to look further to discover the history of the act or ascertain its provisions. Every other view subordinates the legislature and disregards that coequal position in our system of the three departments of government." He then shows that, if such a rule should prevail, a justice of the peace and all other judicial officers would be ²³⁹ compellable and would have the right to investigate the question whether any legislative act was passed according to the requirements of the constitution, and whether it was procured by mistake, fraud, or otherwise, and upon the complaint of any resident taxpayer.

With these authorities we are content. There are numerous others, but it would be useless to pursue them. We are considering the main and important question which we understand the plaintiff intended to bring to the attention of the court, without any remarks on the pleadings. It seems to be conceded that the main allegation cannot be established by the journals as evidence, and that consequently it must be done by some other kind of proof. It is urged that fraud vitiates everything, but if we can go behind the record, would not mistake, bribery, etc., serve equally as well? It is also argued that the fraud alleged is admitted,

and is therefore to be taken as a fact for the purposes of this action. Admitted by whom? The respondent does not admit it in his answer. The motion was to dismiss for want of jurisdiction and the court rendered its decision expressly on that ground. The defendant is a mere ministerial state officer, who was not a member of the legislature, and has no authority from it to plead or admit anything for it. Is he authorized by the speakers of the two houses to admit that they signed the bill by mistake? They have made no such admission so far as this record discloses, and they have no opportunity to admit or deny anything. Is the defendant authorized to admit that by some unknown and fraudulent means the bill was enrolled? If so, who authorized him to admit it? The defendant might have ignored this proceeding entirely without the slightest dereliction of duty. Who then defends the legislature or its speakers when this grave question is under consideration? The executive does not feel it his duty to ²⁴⁰ defend in the matter, presumably because he is not authorized by any one to do so. Then, is there such admission of fraud or any other wrong as to enable the court to treat the allegations of the complaint as facts? But, however these matters are, we have seen that we have no power to make the order asked for by the plaintiff, and that the remedy, if any is needed, is with the legislative branch of the state government.

We are of opinion that his honor committed no error and his judgment is affirmed.

Affirmed.

MONTGOMERY, J., concurring. The single question for decision is, Can this court inquire into and pass upon the history of a paper writing which purports to be an act of the general assembly, and which is authenticated by the undisputed and genuine signatures of the president of the senate and the speaker of the house of representatives? It is to be always kept in mind that the point is not as to the powers of the supreme court to pronounce a law, which is admitted to have been enacted, void by reason of its unconstitutionality. Our jurisdiction in that case would be complete and unchallenged. But the question is, When the legislature has solemnly certified to a fact, that is, to the passage and ratification of an act which is within its own sphere, will the judiciary be permitted to inquire into or dispute that certification? The case

is of the very first impression and it ought to be settled upon the principles of sound reason and well-considered authority. This is a strictly legal question, and ought to be settled according to the principles of the law. The court is aware that its judgment in this case may be attended with dangers in the future, but it is not our province to provide against dangers to the commonwealth further than to construe honestly ²⁴¹ and as intelligently as we can, the laws which the legislative department of the government has enacted. It may be said, however, in this connection that, if policy ought to have governed the court in this matter—if results ought to have been anticipated—we feel that in the decision of the court we have chosen the lesser of the two evils to be dreaded.

The question at issue brought to the light the more than possibilities of two most serious menaces to popular government. The first one, that of the power of a corruptible or incompetent clerical force, or that of a depraved and hired set of lobbyists, or both together, to tamper with the acts and proceedings of the legislature, and have that certified to be law which was never in fact enacted; the second, that of the power of defeated and unscrupulous politicians, when stung by loss of office or a desire for revenge on their political enemies, to practically repeal the legislation of their successful opponents by resorts to the courts upon mere allegations that there was fraud in the passage of the acts or in their ratification, and by procuring injunctions upon affidavits obtained possibly through bribery or through the ignorance or carelessness of the oathmaker. By the decision of the court the latter danger, the far most to be dreaded, is avoided. The presiding officers of the two houses may, by taking a sufficiency of time and by close scrutiny and rigid examination of the bills and wrappers, prevent fraud and error in ratification, if such a thing be attempted; while for the latter danger no limit or restraint can be found except in the conscience of men who have never cultivated a sense of either generosity or justice. The motives and purposes of the plaintiffs in this action are not intended to be reflected on, neither is the character or official conduct of any officer or clerk of the last general assembly. No testimony has been heard in the case, and ²⁴² this court knows nothing of the facts or motives. We have simply discussed dangers in the future in this connection. In the conclusions to which I have arrived I have tried to keep before me the great importance of the legal question

involved, and to keep out of mind, as an utterly insignificant feature of the case, the wretched creatures who would commit such a detestable piece of meanness as the complaint charges. They, when detected, will receive the execration of all good men, and most richly will they deserve it. It would have been well for the people and for the cause of good government if they had, or could have, been ferreted out and named in the complaint, that they might have been pilloried in an indignant public sentiment. But to the law in the case:

Of the three coequal departments of our government, the legislative is of the most importance. It is sovereign as long as it keeps within the bounds of the constitution. The powers of the judicial department are clearly defined and limited in the constitution. Except to hear claims against the state (and then only to recommend action to the general assembly) the whole power of this court is embraced in these words: "The supreme court shall have jurisdiction to review upon appeal any decision of the courts below upon any matter of law or legal inference": Const., art. 4, sec. 8. This means, in plain English, that this court can construe the laws when their meaning is a matter of contention between litigants, and that it can determine in cases properly before it whether or not statutory enactments are constitutional. The writer of this knows of no other instances in which this court can directly or indirectly pass upon the conduct of the general assembly. As to the formulæ that are necessary to convert a bill into a law, we cannot inquire if the ratification in proper form appears and the signatures of the proper officers, ²⁴³ are duly attached. However, in the case before us, the plaintiff alleges that what he styles the pretended act is not a law because it was not read three times in each house before it received the signatures of the presiding officers of both, as the constitution requires. That instrument certainly does require that "All bills and resolutions of a legislative nature shall be read three times in each house before they pass into laws; and shall be signed by the presiding officers of both houses," and it is as equally certain under the decisions of this court that the certificate of ratification attested by the signatures of the presiding officers carries with it the presumption conclusive, that all such bills and resolutions have been duly passed by the bodies, and cannot be questioned by the courts. Suppose, as individuals, we admit, which the answer does not, that

this bill did not pass its several readings, can that fact be shown in a court of law in the face of ratification and the genuine signatures of the presiding officers certifying to the contrary? This is the naked question. Ratification gives authority to the act. The presiding officers who upon ratification attach their signatures to a bill do it in open session, calling the attention of the members to the fact that the same is about to be signed and reading the title of the bill. When it is signed, ratification is thereupon made of it by the body through their agent, the presiding officer. It is their act and deed, and nothing, not even the journal itself, can contradict it or be used as evidence against it. Ratification is of higher dignity and of more authority than the journals kept by the clerks. Ratification and the signatures of the proper officers presume a passage of the bill by the legislature according to the requirements of the constitution, and the courts of law—the judicial department—a coequal department, are not allowed to go behind or question them. We have clear ²⁴⁴ authority for this in our own reports. In the case of *Brodnax v. Groom*, 64 N. C. 244, certain taxpayers in Rockingham county, in their complaint, sought an injunction against the collection of a tax levied by the commissioners under an act of the general assembly, on the ground that the act was private and was passed without the thirty days' notice of application required by the constitution. That case presented the very question which we have before us now. Could the plaintiffs in that case be allowed to go behind the ratification of the act and show by any kind of proof—by the journals or otherwise—that the constitutional requirement had not been complied with? The constitution provides that “the general assembly shall not pass any private law unless it shall be made to appear that thirty days' notice of application to pass such a law shall have been given.” The constitution provides that “All bills and resolutions of a legislative nature shall be read three times in each house before they pass into laws.” The constitutional requirement in both these instances is specific and definite and positive; and yet this court held in *Brodnax v. Groom*, 64 N. C. 244, that the act having been certified by the presiding officers of both houses as duly ratified, it was not competent for the judiciary to go behind the ratification. Chief Justice Pearson, who delivered the opinion of the court in that case, said: “We do not think it necessary to enter into the question whether this is a public act or a private one,

in regard to which thirty days' notice of the application must be given; for, taking it to be a mere private act, we are of the opinion that the ratification certified by the lieutenant governor and the speaker of the house of representatives makes it a matter of record which cannot be impeached before the courts in a collateral way. Lord Coke says: 'A record, until reversed, importeth verity.' There can be no doubt that acts of the general assembly, like judgments of ²⁴⁵ courts, are matters of record, and the idea that the verity of the record can be averred against in a collateral proceeding is opposed to all of the authorities. The courts must act on the maxim '*Omnia presumuntur.*' Suppose an act of congress is returned by the president with his objections, and the vice-president and the speaker of the house certify that it passed afterward by the constitutional majority, is it open for the courts to go behind the record and hear proof to the contrary?" It is clear from the above that the meaning of the chief justice, when he said, "We are of opinion that the ratification certified by the lieutenant governor and the speaker of the house of representatives makes it a matter of record which cannot be impeached before the courts in a collateral way," was, that all attacks in the courts upon legislation which appeared to be ratified and had the signatures of the presiding officers attached were collateral attacks, and that any direct impeachment of such acts must arise in, and be conducted by that jurisdiction which has power in the matter—the legislative department. If he only meant to say that the court could afford a remedy in such matters, but that they would not do so in the case then before the court, because the attack was collateral, then it would have to be admitted that he expressed himself most confusedly in one of the most important questions ever brought before the court. That would be a bold assertion to make of Judge Pearson. And, besides, if the proceeding in that case was not direct, but only collateral, then it is not saying too much to declare that no direct method of attacking an act of the legislature through the courts can be devised. Certainly that was a more direct impeachment than the one now before the court. We are not without direct authorities from other courts than our own.

In the case of *Ex parte Wren*, 63 Miss. 512, 56 Am. Rep. 825, this same ²⁴⁶ question is discussed and decided upon the same principle as was *Brodnax v. Groom*, 64 N. C. 244,

that court holding that an enrolled act of the legislature, having been signed by the presiding officers of the two houses and the governor, is the sole expositor of its contents, and is conclusive evidence that the act so signed contains the provisions of the bill as passed by the two houses. And the journals of those houses cannot be resorted to, to show that such act does not contain amendments to the bill which were adopted by the two branches of the legislature. The court said: "Every other view subordinates the legislature and disregards the coequal position in our system of the three departments of government." The opinion in Wren's case is comparatively of recent date—is a very able one—and reviews the decisions of many of the state courts on this question. It mentions that the courts of many of the states, including that of North Carolina in the case of *Brodnax v. Groom*, 64 N. C. 244, held the same opinion as did the supreme court of Mississippi.

In *Pangborn v. Young*, 32 N. J. L. 29, the principle laid down in the *Brodnax* case is more than indorsed. The supreme court of New Jersey in that case decided: 1. That when an act had been passed by the legislature and signed by the speaker of each house, approved by the governor, and filed in the office of the secretary of state, an exemplification of it under the great seal is conclusive evidence of its existence and contents; 2. That it is not competent for the court to go behind this attestation or to admit evidence to show that the law, as actually voted on and passed and approved by the governor, was variant from that filed in the office of the secretary of state; 3. The minutes of the two houses, or either of them, although kept under the requirements of the constitution, cannot be received as evidence for such purpose. In that ²⁴⁷ case the court said: "The body which passes a law must of necessity promulgate it in some form. In point of fact the legislative power over the certification of its own laws is of necessity almost unlimited, as will appear from the circumstance that, with regard to the body of an act, there is no evidence of any kind but that which the legislature itself furnishes in the copy deposited in the state archives. We are also to reflect that it is the power which passes the law which can best determine what the law is, which itself has created. The legislature in this case has certified to this court by the hands of its two principal officers that the act now before us is the identical statute which it approved, and

in my opinion it is not competent for the court to institute an inquiry into the truth of the fact thus solemnly attested."

The above-cited authorities seem to me to be founded on experience and the law, and on a wise public policy; and as Justice Avery well said, in substance, in *Logan v. North Carolina R. R. Co.*, 116 N. C. 940, we ought to be influenced, when looking for assistance from the decisions of other courts, by those opinions which embody sound principles and just reasoning rather than by a simple numerical array of decided cases.

I have tried to show that the decision of the court in this case is in harmony with its former decisions, and that the court is sustained by the opinions of some of the ablest courts of other states. *State v. Glasgow* (Conf. Rep. N. C.), 38, 2 Am. Dec. 629, was not even cited as an authority by the counsel for plaintiff in the argument before us. It has no bearing that I can see on this case as a law authority, though interesting as a bit of early official corruption. No legislative act or power was questioned. It was simply the case where a former secretary of state himself fraudulently ²⁴⁸ issued a land warrant, was indicted and convicted of the offense, and stripped of his official honors.

In addition, there is to my mind another insuperable objection to the adoption by the court of the plaintiff's view of this case. It is this: There could in that event be no unity of decision even in our own courts. If the certificate of ratification can be inquired into by the courts, then the trial courts, with the same matter in issue, that is, whether an act properly certified as having been ratified had duly passed its several readings, might and could arrive at different verdicts and judgments, as the proof varied in each trial. To-day a statute might be declared void because a jury had determined that it had not passed its several readings, and tomorrow the same statute in a new trial with additional testimony, or in a different court, might be declared good and valid. And, again, if ratification be not conclusive, how are the stability and integrity of our statutory laws to be maintained in other states and abroad?

From the position I have taken in this concurring opinion, it is not necessary for me to discuss the other allegations of the complaint that the signatures of the presiding officers were procured by fraud. If the certificate of ratification cannot be impeached in a court of law, even by the journals

themselves as evidence, it is certain that by all the rules of evidence parol proof cannot be introduced for that purpose.

In conclusion I desire to emphasize that the court has not made a decision upon a mere matter of fraud. It is a question of jurisdiction—of power—whether one coequal department of the government can invade the province of another, and question or dispute the solemn act of the latter attested by the genuine signatures of those officers who are empowered and required to attest and certify those acts. ²⁴⁰ I insist that the decision of the court in this case upholds the integrity and independence of one of the coequal departments of the government, and preserves the power and jurisdiction of the two involved in this suit. It is better for us, and will be better for posterity, if in cases where fraud and deceit have been or shall be practiced upon the presiding officers of the senate and house, by means of which their signatures to spurious bills have been obtained, for the legislature to be convened (if an adjournment was had before discovery) and allowed to correct such errors or mistakes, than that the court should assume a jurisdiction which does not belong to it, and thereby begin an encroachment upon the rights of the legislative department, to end possibly in judicial tyranny, the basest and the most detestable species of oppression.

STATUTES—PROOF OF ENACTMENT.—The case of *Wyatt v. Wheeler et al. Mfg. Co.*, 116 N. C. 270, presented the same question involved in the principal case, and was decided upon the authority of that case, and for the reasons assigned therein. In both of these cases Mr. Justice Clark and Mr. Justice Avery dissented from the majority of the court, and contended that a forged or fraudulent paper purporting to be an enrolled statute that has duly passed both houses of the legislature, and has been presented to the presiding officers thereof, and signed by them under the mistaken belief that it is genuine, may be attacked for fraud; that notwithstanding the statute appears on its face to be regular and in due form, and is thus ratified, the courts may go behind this record, and investigate the manner in which such enrolled bill reached the hands of such presiding officers; that for the purposes of such investigation the journals of the two houses may be looked to, and are competent and relevant evidence by which to ascertain if the bill has been properly introduced, referred, read, enrolled, and enacted, and whether it has received and contains all of the elements of enactment necessary to give it validity as a law; that the presiding officers of the two houses of the legislature are competent witnesses to testify that a fraud has been practiced upon them, and that their signatures have not knowingly and intentionally been placed upon a bill, which, had they investigated, they must have known had not been regularly passed, but had been defeated; and if it appears upon such investigation that from any fraudulent cause the bill has not been duly and regularly passed and enacted as required by

law, the court not only has the power, but it is its absolute duty, to unhesitatingly declare and adjudge that such bill has never become a law, and that it is null and void for all purposes. The subject of the power of the courts to receive evidence, and the nature of the evidence which may be received, to determine whether a statute was so passed as to be invalid is thoroughly discussed, and the cases exhaustively reviewed in notes to *Jones v. Jones*, 51 Am. Dec. 616-623; and *People v. Starnes*, 85 Am. Dec. 357-364. These notes show that there are two irreconcilable views existing upon this topic, the minority of the cases maintaining the rule laid down in the principal case, namely, that if a statute is properly enrolled and authenticated and duly deposited with the secretary of state, it is conclusive evidence of the legislative will at the time of its passage, and the courts cannot look to the journals of the legislature or to other evidence to ascertain whether or how the bill was passed. On the other hand, it is shown that a majority of the cases hold that a document as above described is only *prima facie* a duly enacted statute, and that the courts may receive other evidence, such as the legislative journals, from which to ascertain whether the provisions of the constitution have been observed in the enactment of the law, and if it appears therefrom that they have not, it is not only within the power, but it is the duty of the court to declare the statute null and void. The current of the later and better reasoned authorities is unhesitatingly in favor of the doctrine that a duly enrolled and authenticated statute regular on its face is conclusive of the fact that it was regularly passed, and that the courts cannot go behind it and entertain evidence by which it may be impeached. Wherever the question is one of first impression, this rule is generally adopted, while in some other states the courts continue to follow earlier precedent, and adhere to the contrary view. This is not always the case, however, as the overruling of earlier cases is somewhat common. This question was first presented to the supreme court of the United States for decision in 1891, unhampered by statutory or other provision, and as a pure problem of constitutional law. Mr. Justice Harlan then said in an able opinion: "This question is now presented for the first time in this court. It has received, as its importance required it should receive, the most deliberate consideration. We recognize, on the one hand, the duty of this court, from the performance of which it may not shrink, to give full effect to the provisions of the constitution relating to the enactment of laws that are to operate wherever the authority and jurisdiction of the United States extend. On the other hand, we cannot be unmindful of the consequences that must result if this court should feel obliged, in fidelity to the constitution, to declare that an enrolled bill, on which depend public and private interests of vast magnitude, and which has been authenticated by the signatures of the presiding officers of the two houses of congress, and by the approval of the president, and has been deposited in the public archives as an act of congress, was not in fact passed by the house of representatives and the senate, and therefore did not become a law." The court, after an exhaustive review of the authorities, reached a unanimous conclusion that an enrolled bill, regular on its face, duly authenticated by the official signatures of the presiding officers of both houses of congress, is an official attestation by the two houses that such bill has duly and regularly passed congress, and when the bill thus attested receives the approval of the president, and is deposited in the department of state according to law, its authentication as a bill that has passed congress is complete and unimpeachable, and it is not competent to show from the journals of either house of congress that

an act so authenticated, approved, and deposited did not pass in the precise form in which it was thus signed and approved, or that it was not passed in the manner required by the constitution: *Field v. Clark*, 143 U. S. 649-661, where a valuable note is appended, showing the various rulings of the different state courts on this question. The ruling in *Field v. Clark*, 143 U. S. 649, on this topic was followed with unanimous approval, Mr. Chief Justice Fuller delivering the opinion, in *Lyons v. Woods*, 153 U. S. 649.

While discussing the subject, the court said in *Field v. Clark*, 143 U. S. 672: "The signing by the speaker of the house of representatives, and by the president of the senate, in open session, of an enrolled bill, is an official attestation by the two houses of such bill as one that has passed congress. It is a declaration by the two houses through their presiding officers, to the president, that a bill thus attested has received, in due form, the sanction of the legislative branch of the government, and that it is delivered to him in obedience to the constitutional requirement that all bills which pass congress shall be presented to him. And when a bill thus attested receives his approval and is deposited in the public archives, its authentication as a bill that has passed congress should be deemed complete and unimpeachable. As the president has no authority to approve a bill not passed by congress, an enrolled act in the custody of the secretary of state and having the official attestations of the speaker of the house of representatives, of the president of the senate, and of the president of the United States, carries on its face a solemn assurance of the legislative and executive departments of the government, charged respectively with the duty of enacting and executing the laws, that it was passed by congress. The respect due to coequal and independent departments requires the judicial department to act upon that assurance, and to accept, as having passed congress, all bills authenticated in the manner stated, leaving the courts to determine when the question properly arises whether the act so authenticated is in conformity with the constitution. It is admitted that an enrolled act, thus authenticated, is sufficient evidence of itself—nothing to the contrary appearing upon its face—that it passed congress. But the contention is that it cannot be regarded as a law of the United States if the journal of either house fails to show that it passed in the precise form in which it was signed by the presiding officers of the two houses, and approved by the president. It is said that, under any other view, it becomes possible for the speaker of the house of representatives and the president of the senate to impose upon the people as a law a bill that was never passed by congress. But this possibility is too remote to be seriously considered in the present inquiry. It suggests a deliberate conspiracy to which the presiding officers, the committee on enrolled bills, and the clerks of the two houses must necessarily be parties, all acting with a common purpose to defeat an expression of the popular will in the mode prescribed by the constitution. Judicial action based upon such a suggestion is forbidden by the respect due to a co-ordinate branch of the government. The evils that may result from the recognition of the principle that an enrolled act, in the custody of the secretary of state, attested by the signatures of the presiding officers of the two houses of congress, and the approval of the president, is conclusive evidence that it was passed by congress, according to the forms of the constitution, would be far less than those that would certainly result from a rule making the validity of congressional enactments depend upon the manner in which the journals of the respective houses are kept by the subordinate officers charged with the duty

of keeping them. The views we have expressed are supported by numerous adjudications in this country, to some of which it is well to refer. In *Pangborn v. Young*, 32 N. J. L. 29, 37, the question arose as to the relative value, as evidence of the passage of a bill, of the journals of the respective houses of the legislature and the enrolled act authenticated by the signatures of the speakers of the two houses and by the approval of the governor. The bill there in question, it was alleged, originated in the house and was amended in the senate, but, as presented to and approved by the governor, did not contain all the amendments made in the senate. Referring to the provision of the constitution of New Jersey, requiring each house to keep a journal of its proceedings—which provision is in almost the same words as the above clause quoted from the federal constitution—the court, speaking by Chief Justice Beasley, said that it was impossible for the mind not to incline to the opinion that the framers of the constitution, in exacting the keeping of journals, did not design to create records that were to be the ultimate and conclusive evidence of the conformity of legislative action to the constitutional provisions relating to the enactment of laws. In the nature of things, it was observed, these journals must have been constructed out of loose and hasty memoranda made in the pressure of business and amid the distractions of a numerous assembly. The chief justice said: ‘Can any one deny that, if the laws of the state are to be tested by a comparison with these journals, so imperfect, so unauthenticated, that the stability of all written law will be shaken to its very foundation? Certainly no person can venture to say that many of our statutes, perhaps some of the oldest and most important, those which affect large classes of persons or on which great interests depend, will not be found defective, even in constitutional particulars, if judged by this criterion. . . . In addition to these considerations, in judging of consequences, we are to remember the danger under the prevalence of such a doctrine to be apprehended from the intentional corruption of evidence of this character. It is scarcely too much to say that the legal existence of almost every legislative act would be at the mercy of all persons having access to these journals; for it is obvious that any law can be invalidated by the interpolation of a few lines or the obliteration of one name, and the substitution of another in its stead. I cannot consent to expose the state legislation to the hazards of such probable error or facile fraud. The doctrine contended for on the part of the evidence has no foundation, in my estimation, on any considerations of public policy.’ The conclusion was, that upon grounds of public policy, as well as upon the ancient and well-settled rule of law, a copy of a bill bearing the signatures of the presiding officers of the two houses of the legislature and the approval of the governor, and found in the custody of the secretary of state, was conclusive proof of the enactment and contents of a statute, and could not be contradicted by the legislative journals or in any other mode. These principles were affirmed by the New Jersey court of errors and appeals in *Freeholders of Passaic v. Stevenson*, 46 N. J. L. 173, 184, and in *Standard Underground Co. v. Attorney General*, 46 N. J. Eq. 270, 276; 19 Am. St. Rep. 394. In *Sherman v. Story*, 30 Cal. 253, 275, 89 Am. Dec. 93, the whole subject was carefully considered. The court, speaking through Mr. Justice Sawyer, said: ‘Better, far better, that a provision should occasionally find its way into the statute through mistake, or even fraud, than that every act, state and national, should at any and at all times be liable to be put in issue and im-

peached by the journals, loose papers of the legislature, and parol evidence. Such a state of uncertainty in the statute laws of the land would lead to mischiefs absolutely intolerable. . . . The result of the authorities in England and in the other states clearly is, that, at common law, whenever a general statute is misrecited, or its existence denied, the question is to be tried and determined by the court as a question of law—that is to say, the court is bound to take notice of it, and to inform itself the best way it can; that there is no plea by which its existence can be put in issue and tried as a question of fact; that if the enrollment of the statute is in existence, the enrollment itself is the record, which is conclusive as to what the statute is, and cannot be impeached, destroyed, or weakened by the journals of parliament or any other less authentic or less satisfactory memorials; and that there has been no departure from the principles of the common law in this respect in the United States, except in instances where a departure has been grounded on, or taken in pursuance of, some express constitutional or statutory provision requiring some relaxation of the rule, in order that full effect might be given to such provisions; and in such instances the rule has been relaxed by judges with great caution and hesitation, and the departure has never been extended beyond an inspection of the journals of both branches of the legislature.’ The provisions of the California constitution, in force when the above case was decided, relating to the journals of legislative proceedings, were substantially like the clause upon the subject in the constitution of the United States. The doctrines of the above case were reaffirmed in *People v. Burt*, 43 Cal. 560. But it should be observed that at a subsequent date a new constitution was adopted in California, under which the journals have been examined to impeach an enrolled bill. This constitution declared ‘that on the final passage of all bills they shall be by yeas and nays upon each bill separately, and shall be entered on the journals, and no bill shall become a law without the concurrence of a majority of the members elected to each house.’ The journals showing that on an amendment less than a majority of the members elected to the house voted for it, the statute was declared not to be constitutionally enacted: *The Railroad Tax case*, 8 Saw. 238, 293. Under the same constitution a statute was adjudged not to be validly enacted because not read at length on three several days in each house, but the failure to so read the statute in question seems to have been conceded, and no question was presented respecting the admissibility of evidence, or the mode of proving the nonobservance of the constitutional requirement: *Weill v. Kenfield*, 54 Cal. 111. By the most recent case in the same state upon this subject, it is settled that the journals of the legislature need not affirm the existence of every act required by the constitution in the enactment of a law, and that it will be presumed, in the absence of a showing to the contrary, where the journals are silent, that each of such acts was done: *People v. Dunn*, 80 Cal. 211; 13 Am. St. Rep. 118. Neither this nor any other decision of the courts of this state is authority for the proposition that the enrolled statute may be impeached by extrinsic evidence.

“A case very much in point is *Ex parte Wren*, 63 Miss. 512, 527, 532; 56 Am. Rep. 825. The validity of a certain act was there questioned on the ground that, although signed by the presiding officers of the two houses of the legislature, and approved by the governor, it was not law, because it appeared from the journals of those bodies, kept in pursuance of the constitution, that the original bill, having passed the house, was sent to the senate, which passed it with numerous amendments, in all of which the house concurred,

but the bill, as approved by the governor, did not contain certain amendments which bore directly upon the issues in the case before the court. The court, in a vigorous opinion delivered by Mr. Justice Campbell, held that the enrolled act signed by the president of the senate and the speaker of the house of representatives and the governor is the sole exposition of its contents, and the conclusive evidence of its existence according to its purport, and that it is not allowable to look further to discover the history of the act or ascertain its provisions. After a careful analysis of the adjudged cases the court said: 'Every other view subordinates the legislature and disregards that coequal position in our system of the three departments of government. If the validity of every act published as law is to be tested by examining its history, as shown by the journals of the two houses of the legislature, there will be an amount of litigation, difficulty, and painful uncertainty appalling in its contemplation, and multiplying a hundredfold the alleged uncertainty of the law. Every suit before every court, where the validity of a statute may be called in question as affecting the right of a litigant, will be in the nature of an appeal, or writ of error, or bill of review, for errors apparent on the face of the legislative records, and the journals must be explored to determine if some contradiction does not exist between the journals and the bill signed by the presiding officers of the two houses. What is the law to be declared by the court? It must inform itself as best it can what is the law. If it may go beyond the enrolled and signed bill and try its validity by the record contained in the journals, it must perform this task as often as called on, and every court must do it. A justice of the peace must do it, for he has as much right and is as much bound to preserve the constitution and declare and apply the law as any other court, and we will have the spectacle of examination of journals by justices of the peace, and statutes declared to be not law as the result of their journalistic history, and the circuit and chancery courts will be constantly engaged in like manner, and this court, on appeal, have often to try the correctness of the determination of the court below as to the conclusion to be drawn from the legislative journals on the inquiry as to the validity of the statutes thus tested. . . . Let the courts accept as statutes, duly enacted, such bills as are delivered by the legislature as their acts authenticated as such in the prescribed mode.' In *Weeks v. Smith*, 81 Me. 538, 547, it was said: 'Legislative journals are made amid the confusion of a dispatch of business, and therefore, much more likely to contain errors than the certificates of the presiding officers are to be untrue. Moreover, public policy requires that the enrolled statutes of our state, fair upon their faces, should not be put in question after the public have given faith to their validity. No man should be required to hunt through the journals of a legislature to determine whether a statute properly certified by the speaker of the house and the president of the senate, and approved by the governor, is a statute or not. The enrolled act, if a public law, and the original, if a private act, have always been held in England to be records of the highest order, and if they carry no "death wounds" in themselves, to be absolute verity, and of themselves conclusive.' To the same general effect are *Brodnax v. Commissioners*, 64 N. C. 244, 248; *State of Nevada v. Swift*, 10 Nev. 176; 21 Am. Rep. 721; *Evans v. Browne*, 30 Ind. 514; 95 Am. Dec. 710; *Edgar v. Randolph County Commrs.*, 70 Ind. 331, 338; *Pacific R. R. v. Governor*, 23 Mo. 353, 362, et seq.; 66 Am. Dec. 673; *Louisiana Lottery Co. v. Richoux*, 23 La. Ann. 743; 8 Am. Rep. 602.

“There are cases in other state courts which proceed upon opposite grounds from those which we have indicated as proper. But it will be found, upon examination, that many of them rested upon constitutional or statutory provisions of a peculiar character, which, expressly or by necessary implication, required or authorized the court to go behind the enrolled act, when the question was, whether the act, as authenticated and deposited in the proper office, was duly passed by the legislature. This is particularly the case in reference to the decisions in Illinois: *Spangler v. Jacoby*, 14 Ill. 297; 58 Am. Dec. 571; *Turley v. County of Logan*, 17 Ill. 151; *Prescott v. Canal Trustees*, 19 Ill. 324; *Supervisors v. People*, 25 Ill. 181; *Ryan v. Lynch*, 68 Ill. 160; *People v. Starne*, 35 Ill. 121; 85 Am. Dec. 348. In the last-named case it was said: ‘Were it not for the somewhat peculiar provision of our constitution, which requires that all bills before they can become laws shall be read three several times in each house, and shall be passed by a vote of a majority of all the members elect, a bill thus signed and approved would be conclusive of its validity and binding force as a law According to the theory of our legislation, when a bill has become a law there must be record evidence of every material requirement, from its introduction until it becomes a law, and this evidence is found upon the journals of the two houses.’ But the court added: ‘We are not, however, prepared to say that a different rule might not have subserved the public interest equally well, leaving the legislature and the executive to guard the public interest in this regard, or to become responsible for its neglect.’”

In a late case in South Carolina (*State ex rel. Hoover v. Chester*, 39 S. C. 307), the court, as a unit, adopted the doctrine expounded by the supreme court of the United States, and in doing so was obliged to overrule the earlier cases of *State v. Platt*, 2 S. C. 150, 16 Am. Rep. 647, and *State v. Hagood*, 13 S. C. 46, maintaining the contrary. The court, by Mr. Justice Pope, said: “However unpleasant it may be to reverse previous decisions of this court, still, after full and mature consideration, we feel it to be a duty we owe the state that the case of *State v. Platt*, 2 S. C. 150; 16 Am. Rep. 647, should be and is hereby overruled. As the case of *State v. Hagood*, 13 S. C. 46, was really decided upon the authority of Platt’s case, it follows necessarily that the case of Hagood must fall when the foundation upon which it rests is taken away. We announce that the true rule is, that when an act has been duly signed by the presiding officers of the general assembly, in open session in the senate house, approved by the governor of the state, and duly deposited in the office of the secretary of state, it is sufficient evidence, nothing to the contrary appearing upon its face, that it passed the general assembly, and that it is not competent, either by the journals of the two houses, or either of them, or by any other evidence, to impeach such an act. And this being so, the court is not at liberty to inquire into what the journals of the two houses may show as to the successive steps which may have been taken in the passage of the original bill”: *State ex rel. Hoover v. Chester*, 39 S. C. 316, 317.

This question was first presented to the supreme court of the state of Washington in *State v. Jones*, 6 Wash. 452, where it was decided, after a thorough and learned review of the authorities, that the enrolled bill on file in the office of the secretary of state of an act of the legislature, which is duly signed by the presiding officers of both houses thereof, and which otherwise appears regular on its face, is conclusive evidence of the regularity of all proceedings necessary for its enactment in conformity with con-

stitutional provisions. In *Ex parte Wren*, 63 Miss. 512, 56 Am. Rep. 825, it was held, overruling *Brady v. West*, 50 Miss. 68, that an enrolled statute, signed by the presiding officers of the two houses of the legislature and the governor, is the sole expositor of its contents, and is conclusive evidence that the act so signed contains the provisions of the bill as passed by the two houses. The journals of those houses cannot be resorted to to show that such act does not contain amendments to the bill which were adopted by the two branches of the legislature. And again, in *Hunt v. Wright*, 70 Miss. 298, it was decided that courts are bound to accept as valid legislative enactments such acts as are duly authenticated in the mode prescribed by the constitution, and which do not on their face bear evidence of a disregard of it. They cannot go behind such acts and consult the journals, or otherwise inquire whether the legislature complied with the rules of procedure commanded by the constitution for their passage and enactment. Among the modern authorities maintaining the views above set forth may be cited *Weeks v. Smith*, 81 Me. 538; *Evans v. Browne*, 30 Ind. 514; 95 Am. Dec. 710; *Edgar v. Board of Commrs.*, 70 Ind. 331-338; *Sherman v. Story*, 30 Cal. 253; 89 Am. Dec. 93; *Board of Commrs. v. Burford*, 93 Ind. 383; *Standard Underground Cable Co. v. Attorney General*, 46 N. J. Eq. 270; 19 Am. St. Rep. 394; *Kilgore v. Magee*, 86 Pa. St. 401; *Williams v. Taylor*, 83 Tex. 667; *Ex parte Tipton*, 28 Tex. App. 439; *Railway v. Governor*, 23 Mo. 353; 66 Am. Dec. 673; *State v. Swift*, 10 Nev. 176; 21 Am. Rep. 721; *Duncombe v. Prindle*, 12 Iowa, 1; *Louisiana State Lottery Co. v. Richoux*, 23 La. Ann. 743; 8 Am. Rep. 602. In addition to the cases cited and reviewed in the notes to *Jones v. Jones*, 51 Am. Dec. 616, and *People v. Starne*, 85 Am. Dec. 356, there are a large number of later cases which maintain that the courts, in determining whether an enrolled statute, duly authenticated by the signatures of the presiding officers of the two houses of the legislature, approved by the executive, and properly deposited in the proper office, was passed in conformity with constitutional requirements, may go behind this record, and resort to the journals of the legislature to ascertain the steps taken by each body in the passage of the bill, and if it affirmatively appears from such journals that such statute, though regular on its face, was not actually passed and enacted as required by the constitution, or was not passed in the form in which it appears as enrolled, it must be declared invalid. These cases all hold that an enrolled bill, properly authenticated, is prima facie evidence of its regularity and validity, and is presumed to have been passed in accordance with the requirements of the constitution, but this presumption is not conclusive, and may be overthrown by the legislative journals, of which the courts take judicial knowledge, and to which they may resort as evidence. "Although, when an act appears in the statute book purporting to have been approved by the governor and published by authority of law, the presumption is that it was regularly passed, yet the courts can, and, if necessary, will, look behind the printed statute to the legislative records to ascertain whether it was in fact passed in accordance with the forms and in the manner prescribed by the constitution": *Worthen v. Baggett*, 32 Ark. 515.

The leading case and the basis for this line of decision is that of *Spangler v. Jacoby*, 14 Ill. 297; 58 Am. Dec. 571. In that case it was said: "The printed statute book is evidence of the acts contained therein. It is not, however, conclusive, but may be corrected by the original acts on file in the secretary's office. It is competent to go behind a printed statute, and show from the enrolled law that it is erroneously published. The journals of either branch of the legislature are the proper evidence of the action of

that branch upon all matters before it. In our opinion it is clearly competent to show from the journals of either branch of the legislature that a particular act was not passed in the mode prescribed by the constitution, and thus defeat its operation altogether; and when a contest arises as to whether the act was thus passed the journal may be appealed to, to settle it. It is the evidence of the action of the house, and by it the act must stand or fall. It certainly was not the intention of the framers of the constitution that the signatures of the speakers and executive should furnish conclusive evidence of the passage of a law." The late cases, which entertain and adopt the views set forth above, are as follows: *Moog v. Randolph*, 77 Ala. 597; *Stein v. Leeper*, 78 Ala. 517; *Perry County v. Selma etc. R. R. Co.*, 58 Ala. 546; *Webster v. Little Rock*, 44 Ark. 536; *Glidewell v. Martin*, 51 Ark. 559; *In re Roberts*, 5 Col. 525; *Robertson v. People*, 20 Col. 279; *State v. Brown*, 20 Fla. 407; *Mathis v. State*, 31 Fla. 291; *People v. Loewenthal*, 93 Ill. 191; *In re Vanderberg*, 28 Kan. 243; *Weyand v. Stover*, 35 Kan. 545; *State v. Robertson*, 41 Kan. 200-202; *Hollingsworth v. Thompson*, 45 La. Ann. 222; 40 Am. St. Rep. 220; *Legg v. Annapolis*, 42 Md. 203; *Rode v. Phelps*, 80 Mich. 598; *People v. McElroy*, 72 Mich. 446; *State v. Hastings*, 24 Minn. 78; *State v. Peterson*, 38 Minn. 143; *Lincoln v. Haugan*, 45 Minn. 451; *State v. McLelland*, 18 Neb. 237; 53 Am. Rep. 814; *State v. Robinson*, 20 Neb. 96; *Opinion of the Justices*, 35 N. H. 579; *Opinion of the Justices*, 45 N. H. 607; *Opinion of the Justices*, 52 N. H. 622; *Rumsey v. New York etc. R. R. Co.*, 130 N. Y. 88; *State v. Smith*, 44 Ohio St. 348; *State v. Kieseewetter*, 45 Ohio St. 254; *Currie v. Southern Pacific Co.*, 21 Or. 566; *Williams v. State*, 6 Lea. 549; *Brewer v. Mayor of Huntingdon*, 86 Tenn. 732; *State v. Algood*, 87 Tenn. 163; *Wise v. Bigger*, 79 Va. 269; *Osburn v. Staley*, 5 W. Va. 85; 13 Am. Rep. 640; *Bound v. Wisconsin Cent. R. R. Co.*, 45 Wis. 543. In *State v. McLelland*, 18 Neb. 236-243, 53 Am. Rep. 814, the court said: "The journals of each house were evidently intended to furnish the public and the courts with the means of ascertaining what was actually done in each branch of the legislature. They are to be treated as authentic records of the proceedings, and the court may resort to them when the validity of an act is questioned, upon the ground of the failure of the legislature to observe a matter of substance in its passage, for the purpose of ascertaining whether the constitutional provisions have been substantially complied with or not. The certificate of the presiding officers is merely prima facie evidence that an act has been duly passed, and will be overthrown if it appears from the journals that it was not." In *Rode v. Phelps*, 80 Mich. 598-608, the court said: "The law must fail if the court has power to go behind the certificates of the presiding officers of the two houses and the approval of the governor, and inspect the journals to ascertain whether the law was actually passed by the legislature as so certified and approved. We have heretofore uniformly held, in this state, that the courts would take cognizance of the journals of the legislature, and look into them for the purpose of determining whether the methods of the constitution have been followed in the passage of laws, considering that the safety and permanency of our institutions would be best promoted by such holding. This case exemplifies the wisdom of these decisions." The cases which maintain this doctrine also support the rule that a bill duly enrolled, authenticated, and approved is presumed to have been passed by the legislature in conformity with the requirements of the constitution, unless the contrary is made affirmatively to appear; and the proof furnished by the journals of the two houses, in matters of procedure, must be clear and conclusive in order to overcome this presumption. It is not overthrown by

he failure of the journals to show any fact which is not specially required by the constitution to be entered therein. In other words, if the journals are silent, the presumption in favor of the regularity of the passage and enactment of the bill, and of its validity as a law, will prevail: *State v. Peterson*, 38 Minn. 143; *People v. Dunn*, 80 Cal. 211; 13 Am. St. Rep. 118; *Hollingsworth v. Thompson*, 45 La. Ann. 222; 40 Am. St. Rep. 220; *Hall v. Steele*, 82 Ala. 562; *Walker v. Griffith*, 60 Ala. 361; *Williams v. State*, 6 Lea, 549; *State v. Algood*, 87 Tenn. 163; *Butler v. State*, 89 Ga. 821; *Mathis v. State*, 31 Fla. 291; *Massachusetts etc. Ins. Co. v. Colorado etc. Co.*, 20 Col. 1. The doctrine maintained by these cases is thus clearly stated in *State v. Francis*, 26 Kan. 724, 731: "The enrolled statute is very strong presumptive evidence of the regularity of the passage of the act and of its validity, and it is conclusive evidence of such regularity and validity, unless the journals of the legislature show clearly, conclusively, and beyond all doubt that the act was not passed regularly and legally. If there is any room to doubt as to what the journals of the legislature show, if they are merely silent or ambiguous, or if it is possible to explain them upon the hypothesis that the enrolled statute is correct and valid, then it is the duty of the courts to hold that the enrolled statute is valid; but, where each house is required by the constitution to keep and publish a journal of its proceedings, such journal cannot be wholly ignored as evidence. Such journal must be given some weight in determining the regularity and validity of the passage of statutes, and, therefore, when there can be no room for doubt from the evidence furnished by such journal that the statute was not passed by a constitutional majority of the members of either house, then the courts may declare that the supposed statute was not legally passed, and is invalid": *State v. Francis*, 26 Kan. 732.

RUSSELL v. TOWN OF MONROE.

[116 NORTH CAROLINA, 720.]

MUNICIPAL CORPORATIONS—DUTY TO KEEP STREETS IN REPAIR.—The law imposes upon municipal authorities the imperative duty of keeping in proper repair the streets and bridges of the town.

MUNICIPAL CORPORATIONS.—Municipal authorities of a town are negligent in leaving open a ditch where it crosses a sidewalk, for a sufficient space to admit the body of a person walking upon such highway.

NEGLIGENCE.—PREVIOUS KNOWLEDGE BY A PERSON INJURED of the existence of a defect in a sidewalk does not per se establish negligence on his part.

MUNICIPAL CORPORATIONS—DUTY TO KEEP STREETS IN REPAIR.—A person walking upon a sidewalk has a right to expect and to act on the assumption that the municipal authorities have properly discharged their duty by keeping the streets in good repair; and the only exception to this rule is, that persons must take notice of such structures as the necessities of commerce or the convenient occupation of dwelling-houses may require.

MUNICIPAL CORPORATIONS—NEGLIGENCE—BURDEN OF PROOF.—In an action against a city to recover for a personal injury caused by a defect in a sidewalk the burden of proof is on the city to show contributory

negligence, and a failure to exercise reasonable or ordinary care on the part of the party injured.

CONTRIBUTORY NEGLIGENCE IS WANT OF ORDINARY CARE on the part of a party injured, and a proximate connection between that and the injury. If such party acts with ordinary prudence, in view of surrounding circumstances suggestive of danger, there is no contributory negligence.

NEGLECT—EXERCISE OF CARE.—If a defendant has by carelessness left the plaintiff exposed to peril as a natural consequence of its conduct, the failure of the plaintiff to exercise unusual caution to avoid an ensuing danger is not deemed the proximate cause of the injury. The plaintiff is not bound to exercise more than ordinary care because he might possibly, before or at the time of sustaining the injury, have thereby discovered that defendant had carelessly left him exposed to danger.

NEGLECT—DUTY TO GUARD AGAINST DANGER.—A person is not negligent in failing to provide against a danger that could not have been reasonably expected, much less against a danger that he is warranted in assuming does not exist.

ACTION for damages for personal injury. Plaintiff, on her return from church on a very dark night, crossed and walked over a street in the town of Monroe on a plank across a ditch and onto the sidewalk, and, making a step too many, fell into a hole, and greatly injured herself. She had been living in Monroe only one year, had been up town but very little, and had never seen the hole before. This hole was unlighted and unguarded, and so deep that she could not get out without assistance. The town authorities had, some considerable time prior to the accident, been notified of the existence of the hole, and of its dangerous character. The following issues were submitted to the jury: "1. Was plaintiff injured by the negligence of the defendants? A. Yes." "2. If so, did the plaintiff, by her own negligence, contribute to her own injuries? A. Yes." Judgment for the defendants, and plaintiff appealed.

MacRae & Day, for the appellant.

F. I. Osborne and Battle & Mordecai, for the appellee.

726 AVERY, J. The law imposes upon the mayor and commissioners of incorporated towns the imperative duty of "keeping in proper repair the streets and bridges of the town" (Code, sec. 3803), and, for a failure to fulfill its requirements they may subject themselves to criminal liability: *State v. Commissioners*, 4 Dev. 345. The testimony fully warranted the jury in finding that the governing authorities of the town were negligent in leaving open a ditch three feet deep at the

point where it crossed a part ⁷²⁷ of the sidewalk, for sufficient space (two and a half by four feet) to admit the body of a person walking along such footway: *Bunch v. Edenton*, 90 N. C. 431. But the defendant did not appeal, and the response to the first issue, therefore, stands unchallenged. It has been held in many of the leading courts of this country that the previous knowledge of the injured person of the existence of a defect in a sidewalk does not per se establish negligence on his part: Morrill on City Negligence, 139, and authorities cited; *Diveny v. Elmira*, 51 N. Y. 512; *Darling v. Mayor*, 18 Hun, 340; *Dewire v. Bailey*, 131 Mass. 169; 41 Am. Rep. 219; *Gilbert v. Boston*, 139 Mass. 313.

If the plaintiff was exercising reasonable or ordinary care for her own safety when she fell into the ditch she had a right to demand that the jury respond in the negative to the second issue: Jones on Negligence of Municipal Corporations, sec. 221; *Bunch v. Edenton*, 90 N. C. 431. The evidence is that the plaintiff had never actually noticed "the hole before," though she admits that she might possibly have seen it if she had been paying strict attention to her pathway when she fell. She had a right to expect and to act on the assumption that the authorities of the town had properly discharged their duty by keeping the streets in good repair: *Bunch v. Edenton*, 90 N. C. 435; Morrill on City Negligence, 136-138; *Indianapolis v. Gaston*, 58 Ind. 224. Perhaps the only exception to this rule is the reasonable requirement that persons must take notice of such structures as the necessities of commerce, or the convenient occupation of dwelling-houses, such as exterior basement stairs: *Buesching v. St. Louis etc. Co.*, 6 Mo. App. 85. The case of *Walker v. Reidsville*, 96 N. C. 382, is distinguishable from that at bar because there the pit into which the plaintiff fell was some distance from the sidewalk (fifty-six feet) though ⁷²⁸ it was excavated by the town and upon property owned by it, and the plaintiff had actual notice of its existence.

The burden was on the defendant under our statute to prove contributory negligence, and in order to thus avoid the consequences of its own carelessness it was necessary to show that the plaintiff failed to exercise reasonable or ordinary care for her own safety. If she did not put herself in fault by careless conduct, she had a right to demand that the jury be instructed to answer the second issue in the negative: Jones on Negligence of Municipal Corporations, sec. 221. To

constitute contributory negligence (says Beach in his work on that subject, section 8) there must be a want of ordinary care on the part of the plaintiff and a proximate connection between that and the injury. Perhaps, besides these two, there are no other necessary elements. Certainly they are the two points of difficulty in the question. "Did the plaintiff exercise ordinary care under the circumstances? Was there a proximate connection between his act or omission and the hurt he complains of?" We can conceive of no reason, and we know no authority, for holding the plaintiff to a higher degree of care than that involved in what is known as the rule of the prudent man. What is reasonable care is to be determined in some, probably most of jurisdictions, largely by the jury, but with us, when the facts are undisputed, by the court. It is the universal rule, however, that there is no contributory negligence where the plaintiff acts with ordinary prudence, in view of surrounding circumstances suggestive of danger: *Morrill on City Negligence*, 132, 140; *Mason v. Richmond etc. R. R. Co.*, 111 N. C. 482; 32 Am. St. Rep. 814; *Emery v. Raleigh etc. R. R. Co.*, 109 N. C. 589; *McAdoo v. Richmond etc. R. R. Co.*, 105 N. C. 140.

As a specific act or omission may be declared negligence at a particular period or under given circumstances, which had been held, with other surroundings, not culpable at all, ⁷²⁹ so it will be found that the question whether a plaintiff has contributed by his own carelessness to bring about an injury complained of, must be answered after a comprehensive consideration of the conditions confronting him at the time: It was unquestionably error to tell the jury that the plaintiff was required, in order to rid herself of culpability, to exercise under any circumstances more than ordinary care. While the rule of the prudent man is always the test of carelessness on the part of a plaintiff, what is reasonable care does not depend alone upon what a person does or omits to do, but also upon his environments at the moment, when it is contended that his act or omission enhanced his danger. While the rule that a person, in order to avoid culpability, must exercise such care as a man of ordinary prudence would under similar circumstances use, is always the criterion for testing contributory negligence, as well as negligence, the conditions at the moment may render the same act at one time characteristic of a cautious, at another of a careless, man.

We do not understand the rule to be that where a defendant has by carelessness left the plaintiff exposed to peril as a natural consequence of its conduct, the failure of the plaintiff to exercise unusual caution to avoid the ensuing danger will be deemed the proximate cause of an injury that would not have been sustained had the defendant in the first instance been faultless. The plaintiff was not bound to exercise more than ordinary care, because she might possibly, before or at the time of sustaining the injury, have thereby discovered that the defendant had carelessly left persons, passing along the sidewalk at the particular place, exposed to danger. A defendant cannot take advantage of his own wrong to hold others to a more rigid rule of watchfulness. The plaintiff was warranted in acting on the assumption that the authorities of the town had done their ⁷²⁰ duty. She was not required to see and treasure up in her memory the location of every defective place in the sidewalk which she had or might have seen during the daytime, nor was she expected to see all such places. She was not required to keep a sharp or constant lookout for what could not be reasonably expected, assuming that the authorities of a town had used ordinary care in the discharge of their duty. Locomotive engineers are required to keep a constant lookout for persons, animals, and obstructions on railway tracks in front of trains, because they have reasonable ground to apprehend that some such danger may confront them at any moment. A person is not negligent in failing to provide against what could not have been reasonably expected, much less against a danger that he is warranted in assuming does not exist: *Blue v. Aberdeen etc. R. R. Co.*, 116 N. C. 955. Had it appeared that the plaintiff actually saw the hole, or that she was warned against it in time to have avoided falling into it, the case would have presented a different aspect. Having no actual knowledge of its existence before she stepped into it, she was not required to exercise the same degree of diligence that an engineer in charge of a train must use, because he has reason to apprehend and provide against danger to his passengers from obstructions, or to men or animals on the track at any moment, while she was justified in acting upon the belief that the authorities had done their duty by keeping the sidewalk in safe condition.

There was error in instructing the jury that the plaintiff was expected to use more than ordinary care. The court

should have told them that she was entitled to recovery if the first issue was found in her favor, unless the defendant had shown by a preponderance of the testimony that she did not exercise reasonable or ordinary care.

We think that the case, as the facts were developed on ⁷³¹ the trial, was governed by the principle laid down in *Bunch v. Edenton*, 90 N. C. 431, and that it was not shown that the injury was due to her own negligence. There was error, and the plaintiff is entitled to a new trial.

New trial.

MUNICIPAL CORPORATIONS—DUTY TO KEEP STREETS AND SIDEWALKS IN REPAIR.—A municipal corporation is liable for injuries caused by its failure to comply with the statute requiring it to keep its streets, alleys, sidewalks, roads, and bridges in repair: *Gibson v. City of Huntington*, 38 W. Va. 177; 45 Am. St. Rep. 853, and note. The cases discussing this subject will be found collected in the notes to *McClure v. Sparta*, 36 Am. St. Rep. 927; *Fort Worth v. Crawford*, 15 Am. St. Rep. 847; *Whitfield v. City of Meridian*, 14 Am. St. Rep. 598; *Welter v. St. Paul*, 12 Am. St. Rep. 753; and *Pettengill v. City of Yonkers*, 15 Am. St. Rep. 446.

NEGLIGENCE—KNOWLEDGE OF DEFECTIVE SIDEWALK BY PERSON INJURED.—The mere fact that a person injured from a defect in a sidewalk was aware of such defect is not conclusive evidence of negligence on his part, though it is evidence on the question of his contributory negligence: *McQuillan v. Seattle*, 10 Wash. 464; 45 Am. St. Rep. 799, and note.

NEGLIGENCE—STREETS.—ONE USING A PUBLIC STREET MAY ASSUME that the municipality whose duty it is to do so has kept the street in a safe condition, and he is not guilty of negligence in not exercising diligence to discover dangers therein: *Pettengill v. City of Yonkers*, 116 N. Y. 558; 15 Am. St. Rep. 442; *Jennings v. Van Shaick*, 108 N. Y. 530; 2 Am. St. Rep. 459; *Barry v. Terkildsen*, 72 Cal. 254; 1 Am. St. Rep. 55, and note. To the same effect, *Turner v. City of Newburgh*, 109 N. Y. 301; 4 Am. St. Rep. 453.

CONTRIBUTORY NEGLIGENCE—WHAT IS.—Contributory negligence is a want of the exercise of ordinary care which proximately causes the injury complained of: *Cline v. Crescent City R. R. Co.*, 43 La. Ann. 327; 26 Am. St. Rep. 187, and note; *Smithwick v. Hall etc. Co.*, 59 Conn. 261; 21 Am. St. Rep. 104, and note.

CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.—The burden to prove contributory negligence is in all cases upon the defendant: *Georgia Pac. Ry. Co. v. Davis*, 92 Ala. 300; 25 Am. St. Rep. 47, and note; *Alabama etc. Ry. Co. v. Frazier*, 93 Ala. 45; 30 Am. St. Rep. 29, and note. Contributory negligence as a defense must be affirmatively proved: *Little Rock etc. Ry. Co. v. Hubanks*, 48 Ark. 460; 3 Am. St. Rep. 245, and note; *Little Rock etc. Ry. Co. v. Leverett*, 48 Ark. 333; 3 Am. St. Rep. 230, and note.

**COMMISSIONERS OF BURKE COUNTY v. CATAWBA
LUMBER COMPANY.**

[116 NORTH CAROLINA, 781.]

WATERCOURSES—NAVIGABLE STREAMS ARE NATURAL HIGHWAYS.—The public easement therein, whatever its extent, is paramount to the private right of the riparian proprietor.

WATERCOURSES.—NAVIGABLE STREAMS ARE SUCH AS ARE FLOATABLE or capable of valuable use in bearing the products of the mines, forests, and tillage of the country to mills or markets.

WATERCOURSES—NAVIGABLE STREAM—WHAT IS.—It is not necessary to establish the navigability of a river, and that a public easement exists therein, to show that it is susceptible of use continuously during the whole year for the purpose of floatage, but it is sufficient if it appear that business men may calculate that, with tolerable regularity as to seasons, the water rises to and remains at such a height therein as enables them to make it profitable to use as a highway for transporting logs to mills or markets.

WATERCOURSES—FLOATABLE STREAMS.—If a stream, from natural causes, rises to a sufficient height eight or ten times a year, continuing for two or three days at a time, to float to mill all logs that have been rolled into it, it is a floatable stream and a natural highway, in which the public has an easement, the reasonable use of which is paramount to the rights of all others.

WATERCOURSES—FLOATABLE STREAMS.—It is not necessary that a stream, to be a highway, should be capable of floating logs at all seasons of the year. Its public character depends on its fitness to answer the wants of those whose business requires its use. If the stream is not always navigable it must be capable of floatage, as the result of natural causes, at periods recurring from year to year, and continuing for sufficient time in each year to make it useful as a highway.

WATERCOURSES.—RIGHT OF FLOATAGE in a stream must be exercised with due care for the avoidance of injury to the interests of the riparian proprietors and the owners of the soil beneath the bed of the stream. On the other hand, the stream must be so bridged as to permit of its use for the purpose of floatage.

WATERCOURSES.—BRIDGES CONSTRUCTED OVER FLOATABLE STREAMS so as, by interposing a barrier to floating logs every time the streams rise sufficiently high to carry logs over the shoals, to practically prevent their use by the public, are nuisances and unlawful obstructions.

WATERCOURSES.—STREAMS NOT FLOATABLE can be used for the transportation of logs only by a license from the owner of the bed of the stream or the riparian proprietor.

Moore & Moore, I. T. Avery and C. M. Busbee, for the appellant.

S. J. Ervin, J. T. Perkins, and Burwell, Walker & Cansler, for the appellee

782 **AVERY, J.** It seems to be settled law in North Carolina, as in all of the states, that navigable streams of every

class, however defined or distinguished from other watercourses, are natural highways, and that the public easement, whatever may be its extent, is paramount to the private right of the riparian proprietor: *State v. Narrows Island Club*, 100 N. C. 477; 6 Am. St. Rep. 618; *State v. Glen*, 7 Jones, 321, 327; *Broadnax v. Baker*, 94 N. C. 675; 55 Am. Rep. 633; Gould on Waters, 2d ed., secs. 86, 87, 107, 108, 110; Angell on Watercourses, 541 a; 16 Am. & Eng. Ency. of Law, 236; *Sullivan v. Jernigan*, 21 Fla. 264. All waters, including bays, inlets, rivers, and creeks, "which are navigated by sea vessels," said the court in *State v. Glen*, 7 Jones, 323, "are called navigable in a technical sense, are altogether *publici juris*, and the soil under them cannot be entered and a grant taken out under the entry law. Where the tide ebbs and flows, the shore between the high and low water may be the subject of direct, special, legislative grant: *Ward v. Willis*, 6 Jones, 183; 72 Am. Dec. 570"; *Bond v. Wool*, 107 N. C. 139. The court in that case went on to say that the beds of other streams were "technically styled navigable," and were open for appropriation by individuals by means of grants from the state.

In order to direct the attention more closely to the development of the principles governing the case at bar by a line of decisions in this state, and especially to controvert the contention of counsel that owners of the beds of inland rivers, not navigable for vessels, have the absolute control of the streams, we reproduce the following from the opinion ⁷³³ of Merrimon, J., in *State v. Narrows Island Club*, 100 N. C. 477, 6 Am. St. Rep. 618: "The learned counsel for the appellant pressed upon our attention *State v. Glen*, 7 Jones, 321, as an authority, favoring strongly the absolute right of the owner of the whole bed of the river. This is certainly a misapprehension of the real meaning of that case. The river to which it referred was ascertained to be unnavigable, and the case does not contradict what we have here said. Indeed, the court recognized the public right in case of the navigability of the stream. It said: 'As the riparian proprietor of the land on both sides of the stream, he is clearly entitled to the soil entirely across the river, subject to an easement in the public for the purpose of transportation of flour and other articles in flats and canoes.' It appeared that flat-boats were occasionally used in transporting the articles named."

It still remained for this court, when the forests of the

state began to attract attention and to invite capital to utilize them in commerce, to determine in precisely what classes of streams not technically navigable the easement, which was paramount to the right of the actual owner of the bed of the river or of the riparian proprietor on both sides, existed.

In *McLaughlin v. Hope Mfg. Co.*, 103 N. C. 108, this court, adopting the classification of streams laid down by Wood in his work on Nuisances, second edition, section 457 et seq., defined a navigable stream of the third class to be one which is "floatable or capable of valuable use in bearing the products of the mines, forests, and tillage of the country it traverses to mills or markets." That case was cited and approved subsequently in the case of *State v. White Oak River Corp.*, 111 N. C. 661.

In the dissenting opinion (which was written before the opinion of the court)^a in *Gwaltney v. Scottish etc. Land Co.*, 111 N. C. 547, 552, will be found a definition of a floatable⁷⁸⁴ stream, which was adopted by the court, and which has been since reiterated with approval in *Gwaltney v. Scottish etc. Land Co.*, 115 N. C. 581, and in *Commissioners v. Catawba Lumber Co.* (the case now before us for rehearing), 115 N. C. 590. The language so often approved is as follows: "It is not necessary in order to establish the easement in a river to show that it is susceptible of use continuously during the whole year for the purpose of floatage, but it is sufficient if it appear that business men may calculate that, with tolerable regularity as to seasons, the water will rise to and remain at such a height as will enable them to make it profitable to use as a highway for transporting logs to mills or markets lower down." Justice MacRae in *Gwaltney v. Scottish etc. Land Co.*, 115 N. C. 591, quoting further from the same opinion, says: "When prudent business men may regulate their expenditures with reference to the anticipated rise, the stream becomes a factor in conducting the commerce of the country."

In the former opinion in this case the court laid down, as a further test of floatability, the rule that "a temporary rise passing quickly down is not sufficient to make a stream floatable, and would not be sufficient if the freshet should continue up for even two or three days and be reasonably expected every year. The increase in the depth of the streams occasioned by the rainfall sufficient to float logs occurs eight or

ten times each year, and the water subsides in twenty-four or forty-eight hours. We are of the opinion that this floatability on the occasional and tolerably regular rises of the river must depend on more than a rapid freshet, subsiding as rapidly."

The first question raised by the petition and order granting the rehearing is, whether the two rules laid down as criteria for determining the capacity of streams to subserve the purpose of channels of commerce are not so inconsistent ⁷³⁵ that both cannot be allowed to stand as guides to the people, who are anxious to understand and observe the law, as well as to the profession, whose office it is to advise them. If a stream rises to a sufficient height eight or ten times a year to carry down all the logs that have been rolled into it, may it not be possible that prudent business men would calculate with reasonable certainty on and regulate their expenditures with reference to an anticipated rise that will make the use of the stream as a highway profitable, notwithstanding the fact that it continues for only two or three days, or even a shorter time? The capacity to carry logs from the place, when they are shipped upon it, and deliver them at the point where they are taken out for use, depends chiefly upon the velocity of the stream and the distance they are transported. Courts are not required to so restrict the limit to which judicial knowledge extends as to exclude matters which are of common observation and within the knowledge of all intelligent men: *Deans v. Wilmington etc. R. R. Co.*, 107 N. C. 693; 22 Am. St. Rep. 902. If a stream should carry a log at a velocity of three miles an hour, then in three days, or seventy-two hours, it would be transported a distance of two hundred and sixteen miles, in two days one hundred and forty-four miles, in one day seventy-two miles. It may be that the longest distance for which the Catawba river is used is not seventy-two miles, and that Johns river is not used for more than half that distance. If all the logs awaiting removal on the banks of each stream were removed only ten times a year, but at irregular intervals extending over the nine fall, winter, and spring months, it is not impossible, indeed it is almost certain, that any prudent business man could arrange to get all the logs needed in ten deliveries. Yet it is probable that all are delivered more than fifty times instead of ten.

How can we arbitrarily fix a minimum period for transportation and at the same time leave the capacity for yielding

736 a reasonably certain profit, as a test of floatability? If it may be true that all logs placed alone in either stream would be delivered at the mills of defendant from twenty-seven to sixty-three times, or oftener, in the course of a year, how can we hold that the rises must occur more frequently or continue longer, and leave people who wish to know and obey the law in such a state of doubt and uncertainty that they would be deterred without further information from engaging in this important branch of commerce? The rule which makes susceptibility to use, as a channel for transporting the products of mines and forests, the criterion of floatability, is a test which any intelligent lumberman can comprehend and apply. The other criterion, which, without regard to the probable profits of the business or the actual condition of the stream, would exclude from the benefits of a water highway one who locates his plant on a swift mountain watercourse, which subsides within two or three days, and extend the easement in a sluggish stream to another person, if he settles in the low country, though the water may land as many logs for the one in one day as for the other in four days, is manifestly arbitrary, and inconsistent with the rule that has so often been sanctioned not only by this court in the cases we have cited, but approved by all of the leading text-writers and the courts of those states where extensive and valuable forests have been or are being utilized: 1 Wood on Nuisances, 3d ed., sec. 457; *Davis v. Winslow*, 51 Me. 264-290; 81 Am. Dec. 573; *Gaston v. Mace*, 33 W. Va. 14; 25 Am. St. Rep. 848; *Brown v. Chadbourne*, 31 Me. 9; 50 Am. Dec. 641; *Moore v. Sanborne*, 59 Am. Dec. 220, and note; *Thunder Bay Co. v. Speechly*, 31 Mich. 336; 18 Am. Rep. 184; 6 Lawson's Rights, Remedies, and Practices, sec. 2928.

Gould, in his work on Waters, sections 108 and 109, says: "It is not necessary that the stream, in order to be a highway, should be capable of floating logs at all seasons 737 of the year, but its public character depends on its fitness to answer the wants of those whose business requires its use. If the stream is not always navigable it must be capable of floatage, as the result of natural causes, at periods recurring from year to year, and continuing for a sufficient length of time in each year to make it useful as a highway." Gould cites, among other authorities, the leading case of *Morgan v. King*, 35 N. Y. 454, 459, 91 Am. Dec. 58, to sustain the foregoing proposition, and in view of the fact that the learned

counsel for the plaintiff seemed to misconceive what the court in that case meant by the words "in its natural state," it is perhaps best to call attention to the fact that so far from limiting the use of streams to the periods when they are not swollen from rainfall, the court said: "Nor is it essential to the easement that the capacity of the stream, as above defined, should be continuous, or, in other words, that its ordinary state at all seasons of the year should be such as to make it navigable. If it is ordinarily subject to periodical fluctuations in the volume and height of its water, attributable to natural causes and occurring as regularly as the seasons, and if its periods of high water or navigable capacity ordinarily continue a sufficient length of time to make it useful as a highway, it is subject to the public easement." It is plain, therefore, that the text-writers, all of whom give their sanction to the doctrine of floatability as it has been approved by this court, are warranted in citing *Morgan v. King*, 85 N. Y. 454, 91 Am. Dec. 58, as they do, to sustain their positions.

It will be observed that in almost every instance where we find the words "in its natural state" quoted from *Morgan v. King*, 85 N. Y. 454, 91 Am. Dec. 58, in the opinions of appellate courts, the further discussion of the subject develops the fact that they are used in the sense given to them by the court of New York. "Natural state" in that connection does not seem to have ⁷³⁸ been understood by courts or text-writers as confining the test of use for commercial purposes to the low-water mark, but as referring to the height attained as the result of the regularly recurring rainfalls of every year, which is a natural cause operating with some degree of uniformity: *Lewis v. Coffee County*, 77 Ala. 193; 54 Am. Rep. 55; *The Montello*, 20 Wall. 441; *Gaston v. Mace*, 25 Am. St. Rep. 862, and note; *Moore v. Sanborne*, 59 Am. Dec. 220, note; *Brown v. Chadbourne*, 50 Am. Dec. 649, note.

The intention of the courts seems to have been to limit the right of navigation for logs to those streams made useful by the ordinary rainfall as distinguished from such as would only transport the logs after resorting to artificial means, as by blasting out and deepening the channel or putting in locks or dams with gates: 6 Lawson's Rights, Remedies, and Practice, sec. 2924. We see no reason for following to its logical results the argument of the learned counsel for plaintiff, and taking this occasion to overrule the line of our de-

sions which recognize and define easements for the purpose of floatage. We think that any rule which attempts to fix a definite period of time during which a watercourse at each recurring rise must remain at a sufficient height to transport logs and to adapt that rule alike to long and to short, to swift and to sluggish streams, is in conflict with the general doctrine, which makes capacity for profitable use the test, and, if adhered to, would close for commercial use many watercourses that have all of the elements of natural highways, under the general definition approved by the courts of this and other states containing valuable forests. To illustrate the inconsistency of applying the rule which makes time the test: suppose that logs were floated in Johns river for a distance of only twenty miles and in the Catawba for sixty miles, and that the velocity of the current in the former stream were six miles an hour, in the latter three miles, would it require precisely the same length ⁷⁸⁹ of time necessarily to supply a mill with all of the logs it could saw by the one as by the other? Under a fundamental principle of our system every man is presumed to know, and is therefore required to observe, the law of the land, and no rule ought therefore to be laid down for the government of the people, unless its terms are, or are capable of being, made so certain that they can be understood. Doubtless the instruction which was sustained in *Gwaltney v. Scottish etc. Land Co.*, 115 N. C. 579, was intended to apply to extraordinary freshets, upon the recurrence of which prudent business men could not rely for the success of a milling enterprise, but which often do occur at some time during the year, and are therefore not unexpected. Construed in any other sense it would establish a rule that would prove so inconsistent with the general proposition that has received our sanction and with the leading authorities that both could not be applied as tests in any conceivable case.

We are brought, therefore, to the consideration of the question whether the judge below properly applied the correct definition of a floatable stream to the facts found by him in the case before us? The action is brought to restrain the defendants from floating logs down the Catawba and Johns rivers, because when the water rises to a sufficient height to carry the logs over the shoals they necessarily come in contact with and partially or totally destroy a low bridge across the Catawba and another across Johns river, on a highway

in Burke, and a third bridge across the Catawba river, between Burke and Caldwell counties, one-half of which is under the official management of the plaintiffs. The defendants have been using both of these rivers above the two bridges in Burke county to transport logs to a point on the Catawba below all three of the bridges, where the mill of the defendant is located. At this mill ⁷⁴⁰ the defendants employ about seventy-five laborers and saw about thirty-five thousand feet of lumber a day, and have invested between two hundred and fifty thousand dollars and three hundred and fifty thousand dollars in establishing the plant. The depth of the Catawba river at the bridge known as the Rocky Ford bridge and Lovelady bridge, when the water is at ordinary height, averages two feet, but in some parts of it reaches four feet, and is about three hundred feet wide. The depth of Johns river at the bridge over that stream is about four feet and it is about one hundred feet wide. There are shoals on the Catawba at intervals of about half a mile and on Johns river about one fourth of a mile apart, where the water is only from eight to twelve inches deep at ordinary low water. Between the shoals when the water in either river is at ordinary low-water mark, logs will be carried by the current of both rivers, but not over the shoals without taking out stones and resorting to other artificial helps. Both of these rivers rise eight or ten times a year to a height of from two to four feet above ordinary water, and remain at that height from twenty-four to forty-eight hours, during which period all of the logs placed in the channel of either will be carried over the shoals without obstruction: See Findings, 8, 9. These rises occur in the fall, winter, and spring months, not at fixed periods, but some time during nine months. Besides these rises about two freshets usually occur during every year, when these rivers rise eight to fifteen feet above the low-water line.

Eliminating from this discussion the arbitrary rule prescribing a fixed period for the continuance of the rise, it seems very clear that the learned judge, to whom both parties intrusted the trial of all issues of fact and law, was not in error in holding, upon the facts found by him from the testimony, that both the Catawba and the Johns rivers were in contemplation of law floatable streams. If eight or ten times a year every log placed in either stream above ⁷⁴¹ these bridges will be carried without hindrance or obstruction

over the shoals to the defendant's mill lower down, then it inevitably follows that by cutting and placing logs upon the bank in the way described in the findings of the judge (see findings) a sufficient number can be transported on these highways to supply the mills. The reasonable expectation that it would be within its power every year to transport a sufficient number of logs to keep its mills in operation without resorting to artificial assistance at the shoals, justified its managers in establishing their business. If the judge was correct in finding that these rises "occurring at irregular intervals" during the fall, winter, and spring months are sufficient to carry every log committed to either river over the shoals, then the principle involved here is not affected by the fact that instead of being so provident as to lay in its supplies at the proper seasons, the defendant had sometimes opened a channel at the shoals during the summer months for the passage of logs, though, as his honor finds, the mill had been almost exclusively supplied by floatage. The question is whether the company was warranted in calculating when its business was established that these two highways could be utilized, legitimately, to furnish it full supplies of raw material for its mill. We think that the facts justified the heavy expenditure it has made in the reasonable expectation that the law would protect it in the proper use of these natural highways. If these rivers are floatable, they are natural highways in which the public have, as in other water highways, an easement, the reasonable use of which is paramount to the rights of all others: Gould on Waters, secs. 87-91, 107-110; *Broadnax v. Baker*, 94 N. C. 675; 55 Am. Rep. 633; Angell on Watercourses, 7th ed., sec. 536; 16 Am. & Eng. Ency. of Law, 259, 260, 269, 270, and notes; *Gwaltney v. Scottish etc. Land Co.*, 111 N. C. 547.

⁷⁴² Where a stream is navigable for any purpose it is generally a nuisance to obstruct it: Wood on Nuisances, sec. 464; *State v. Dibble*, 4 Jones, 107; *State v. Parrott*, 71 N. C. 311; 17 Am. Rep. 5; 6 Lawson's Rights, Remedies, and Practice, sec. 2936; *State v. Harper*, 71 N. C. 314; *Lewis v. Keeling*, 1 Jones, 299; 62 Am. Dec. 168; *Hettrick v. Page*, 82 N. C. 65; Elliott on Roads and Streets, 491, and note. This principle, as a general rule, applies to interference with the right of floatage just as to attempts to prevent the passage of vessels in streams affording sufficient channel for them: Wood on Nuisances, sec. 464. But the right of floatage

must be exercised reasonably and with a due regard to the rights of riparian proprietors and the owners of the beds of fresh-water streams, especially such as belong to the third class of navigable waters and are only used as highways for the purpose of transporting logs. The owners of the soil have a right to the reasonable use of the water as a power for propelling machinery and operating the various kinds of mills. While the right to an easement for floatage is superior to that of the proprietor of the soil, the law enforces the use of the dominant easement with due regard to the servient interest. A person using a stream as a highway for transporting logs, as well as one in charge of a steamer plying on navigable water, is answerable for wanton injury in even removing a nuisance: *Gwaltney v. Scottish etc. Land Co.*, 111 N. C. 547; *Lewis v. Keeling*, 1 Jones, 299; 62 Am. Dec. 168.

The governing principle is that the right to the use of a water highway for the transportation of timber is subject to the maxim that we must so use our own as to avoid needless injury to another. The public have the paramount right of way in the public roads, yet that does not excuse one driving a carriage or wagon over it for needlessly injuring a person or even an animal that is temporarily obstructing it: *Davies v. Mann*, 10 Mees. & W. 545. It remains for us to determine in each case that may hereafter ⁷⁴³ arise what is culpable carelessness in the enjoyment of this easement. We adhere to the announcement made by the court in the opinion which we are now reviewing (*Commissioners v. Catawba Lumber Co.*, 115 N. C. 596, 597), that the right of floatage must "be exercised with due care for the avoidance of injury to the interests of the riparian proprietors and the owners of the soil beneath the bed of the stream. And, on the other hand, it would seem that if these were floatable streams, in which the public has an easement for transportation, it would be the duty of the county commissioners, certainly in the absence of express authority to the contrary, to so construct bridges on the highways as to permit the use of rivers for the purpose of floatage." If the streams are highways, then bridges constructed over them so as, by interposing a barrier to floating logs every time the rivers rise sufficiently high to carry them over the shoals, to practically prevent their use by the public are unlawful obstructions: 6 Lawson's Rights, Remedies, and Practice, sec. 2936; *Kean v. Stetson*, 5 Pick. 492; *Charlestown v. Middlesex*, 3 Met. 202. The case last

cited was one where the county commissioners acted under the authority of an act passed by the legislature of Massachusetts, empowering them especially to build the bridge, but not specifying its character, and Chief Justice Shaw, in a strong opinion, announced the principle that the county authorities were not warranted in so constructing the bridge as to obstruct the use of the stream as a highway.

The question of reconciling the conflicting claims of owners of the soil of the bed of the stream, who erect dams across floatable rivers for the purpose of operating mills, is not now before us. The legislature has made provision in certain cases for opening dams so as to permit the passage of logs floated over them to market (Code, sec. 3712), and in chapter 56 of the code, which contains this provision, county commissioners are clothed with authority to ⁷⁴⁴ have streams cleaned out. It would seem that these sections were passed entirely with reference to floatable streams, because, without condemnation, the commissioners would have no right to enter upon and clean out the beds of streams which were not natural highways.

It seems that the low bridges constructed by the plaintiffs and their predecessors have been frequently destroyed during rises in the rivers by trees floating down, but within a few years past the injuries to them have generally been caused by logs that are being transported to the mills of the defendant company. We cannot destroy a great natural right which affects people scattered over hundreds of square miles whose only prospect of disposing of valuable property is dependent upon the use of water for transporting timber to market, in order to save a county the difference between the cost of bridges two or three feet above the low-water mark and more durable structures above the high-water mark. Perhaps it may not be improper to add that where a stream is not floatable it can be used for the transportation of logs only by a license from the owner of the bed of the stream or the riparian proprietor. Without such license one who is using the stream for such a purpose is, either as a trespasser, responsible for at least nominal damages, or, when he creates a nuisance, for any special damage shown to have been actually sustained. It appears incidentally from the testimony that many tributaries of the Catawba other than Johns river, and of which the floatability is not in question here, have been used in some way by the defendant for transport-

ing logs to the Catawba and thence to its mill. This intimation may serve as a guide in regulating its conduct or in adjusting the rights of those interested. In reference to the argument that no sufficient ground had been shown for granting a rehearing, we need only say that the court was not advertent, in its former opinion, to ⁷⁴⁵ the inconsistency of the two tests of floatability given in the same opinion. The question was not discussed in the opinion, and attention was not directly called to it on the argument.

On reviewing the rulings of the learned judge who tried the case below we find no error, and are of the opinion that the judgment should have been affirmed. To the end that it may be now enforced let this opinion be certified to the court below.

Petition allowed.

MR. JUSTICE FURCHES dissented, on the ground that a stream affording sufficient water to float logs over the shoals in its bed only when it rises suddenly eight or ten times every year, continuing at a sufficient height to carry logs for a period of time extending over one or two days, is not a floatable highway in which the public have an easement superior to the right of riparian proprietors and owners of the bed of the stream.

WATERCOURSES—NAVIGABLE—RIGHTS OF PUBLIC IN.—Riparian owners hold their land subject to the right of the public to use the navigable rivers flowing through them as public highways: *Brooks v. Cedar Brook etc. Improvement Co.*, 82 Me. 17; 17 Am. St. Rep. 459. A public easement exists in a stream which is inherently and in its nature capable of being used for the purposes of commerce: *Treat v. Lord*, 42 Me. 552; 66 Am. Dec. 298, and note. See, further, on this subject, the extended notes to *Miller v. Mendenhall*, 19 Am. St. Rep. 231, and *Davis v. Winslow*, 81 Am. Dec. 582.

WATERCOURSES—NAVIGABLE—WHAT ARE.—To be navigable a stream must have sufficient depth and width to float useful commerce, the test being navigable capacity: *Heyward v. Farmers' Min. Co.*, 42 S. C. 138; 46 Am. St. Rep. 702, and note, with the cases collected. See, also, the extended notes to *Miller v. Mendenhall*, 19 Am. St. Rep. 227, and *Hickok v. Hine*, 13 Am. Rep. 262.

WATERCOURSES—FLOATABLE STREAMS.—A river, though a non-navigable stream, is a highway for all the people of the state if in its natural state it is capable of floating to market logs and other products of the forest: *Brooks v. Cedar Brook etc. Improvement Co.*, 82 Me. 17; 17 Am. St. Rep. 459, and note. A stream capable of being commonly and generally useful for floating rafts or logs for any useful purpose is subject to the public use as a passageway: *Weise v. Smith*, 3 Or. 445; 8 Am. Rep. 621; *Gerrish v. Brown*, 51 Me. 256; 81 Am. Dec. 569. A stream may be a public highway for the floatage of logs when it is capable in its ordinary and natural stage, in the seasons of high water, of valuable public use: *Thunder Bay Booming Co. v. Speechly*, 31 Mich. 336; 18 Am. Rep. 184; but a stream is not navigable or subject to public right of way which is not capable of being used for the passage of boats or of floating rafts or logs, except when swelled by

freshets: *Morgan v. King*, 35 N. Y. 453; 91 Am. Dec. 58, and note; *Lewis v. Coffee County*, 77 Ala. 190; 54 Am. Rep. 55, and note. See, also, the extended notes to *Davis v. Winslow*, 81 Am. Dec. 583; *Hickok v. Hine*, 13 Am. Rep. 263, and the notes to] *Moore v. Sanborne*, 59 Am. Dec. 220, and *Hubbard v. Bell*, 5 Am. Rep. 108.

WATERCOURSES.—NEGLIGENCE IN FLOATING LOGS IN: See the note to *Hopkins v. Butte etc. Commercial Co.*, 40 Am. St. Rep. 440.

WATERCOURSES—ERECTION OF BRIDGES.—The erection of a bridge over a non-navigable stream is not unlawful, provided a convenient and suitable passageway up and down is left to the public, and navigation is not materially impeded or endangered: Note to *Lancey v. Clifford*, 92 Am. Dec. 565.

MERONEY v. ATLANTA BUILDING AND LOAN ASSN.

[116 NORTH CAROLINA, 882.]

USURY.—A LOAN BY A FOREIGN CORPORATION to a citizen of another state, secured by mortgage on land in that state at usurious interest there, is governed in the settlement of interest upon foreclosure by the law of the latter state, although the contract of loan and mortgage stipulates that it is "solvable" by the laws of the state of the domicile of the corporation, and is made with reference to its laws.

USURY—INTEREST ON FORECLOSURE.—If a mortgage is given on land in one state to secure a loan payable in another, the law of the former state prevails in the settlement of interest upon foreclosure, provided the money loaned is used in that state.

FOREIGN BUILDING AND LOAN ASSOCIATIONS, whose charters invest them with powers greatly in excess of and not contemplated by a local statute, are not building and loan associations within the purview of such statute, and are not entitled to claim any special rights or powers therein granted to such associations as are organized according to its terms, with the limited powers and restricted purposes therein set out.

BUILDING AND LOAN ASSOCIATIONS PROPER are organizations created for the purpose of accumulating funds by monthly subscriptions or savings of members to assist them in building or purchasing for themselves dwellings or real estate, by loaning to them the requisite money from the funds of the society upon good security; but such associations have no power to declare or pay dividends on their stock, make loans at a usurious rate of interest, or carry on a banking business, and whenever they do these things they cease to be building and loan associations, and are not governed by or entitled to privileges under laws providing for the organization and management of such societies.

USURY.—COURTS LOOK NOT MERELY AT THE WORDS, but at the substance, of a transaction to determine whether it is usurious.

USURY.—NO DEVICE OR COVER can be resorted to by building and loan associations by which they can legally take from those who borrow their money more than the legal rate of interest, without incurring the penalties of usury laws.

USURY.—TRANSACTIONS BETWEEN BUILDING AND LOAN ASSOCIATIONS and their borrowing stockholders are simply loans, and usurious if they require the payment of more than the amount loaned and legal interest.

CONSTITUTIONAL LAW.—If Two Constructions of a Statute are Possible, that should be adopted which is most reasonable and in accord with the declared and recognized policy of the state.

USURY.—PENALTIES, PREMIUMS, OR FINES amounting to more than legal interest, and imposed for the nonpayment of money, are usurious.

J. W. Hinsdale, for the appellant.

J. W. & H. L. Cooper, for the appellee.

§§ CLARK, J. The following full and convincing opinion prepared by Mr. Justice Burwell at last term is adopted by the court:

“The question between these parties is, What sum is legally due to the corporation called the Atlanta National Building & Loan Association from the plaintiff on account of a loan of three hundred dollars, made by it to him on September 11, 1890, the payment of which was secured by a deed in trust made by the plaintiff and his wife to the defendant Goldsmith, by which they conveyed to him, as trustee, a certain town lot in Murphy, Cherokee county?

“What the defendant corporation contends for as its dues under its contract with the plaintiff is clearly set out in the letter of its able counsel, which has been made by it a part of its answer. This letter is dated March 10, 1892, is addressed to the plaintiff, and, after telling him that the writer is instructed ‘to foreclose said deed of trust,’ gives him ‘an opportunity to settle’ without a sale of his property, as follows: ‘You were a subscriber to five shares of the common stock, Class “B” of said association, upon which you have paid the dues of 60c per month on each share from March, 1890, to January, 1891, inclusive, eleven months, at \$3 per month, \$33: See By-law, No. 3. On September 11, 1890, you borrowed \$300 from the association and made your note and deed of trust to secure the same according to the charter and by-laws of the company. By this contract you agreed to pay the association, in addition to the dues or monthly installments upon your stock which you contracted to pay upon becoming a stockholder, the sum of \$3 per month as interest and premium on said advance until the stock should reach its par value; and you stipulated that if you failed to pay promptly, when due and payable, the said monthly interest or premium, fines, and monthly payments on said stock for a period of three months after the same became due, or any installment thereof became due, then at the option of the said association the whole indebtedness should at once become due

and collectible. You owe interest and premium for the same time according to your contract—\$3 per month for 14 months, \$42. The association has exercised its option, and now requests due payment of the whole indebtedness. You owe under your contract of subscription to five shares of stock, dues from February, 1891, to March, 1892, 60c per share per month, for 14 months at \$3 per month, \$42. You likewise owe for 14 months at 10c a share per month, or 50c per month for 14 months, \$7: See By-law, No. 8. This makes a total of \$91 to be added to the principal of your note, \$300, which makes a total of \$391. By-law 22, paragraph 22, provides: "After a member has made not less than 11 successive monthly payments of dues, exclusive of the admission or entrance fee, provided he has paid dues for every month up ~~ss~~ to the date of withdrawal and all fines or other charges against him, he may withdraw the amount of dues paid by him, less that part of the same apportioned to the expense fund," as prescribed in by-law No. 25, with interest at 6 per cent per annum for the average time on the amount withdrawable. Paragraph 4 of the same by-law provides: "No withdrawal of shares which are in arrears will be allowed until such arrears with all fines and other charges have been paid; payment of dues must be continued until the month of actual withdrawal; the admission or entrance fee and the ten cents per share per month appropriated to the expense fund cannot be withdrawn. Sixty days' notice in writing to be signed by the shareholder is required for all withdrawals. A withdrawal fee of \$3 must be paid on each certificate. Each notice to withdraw will have attention in order in which it is received. Dues are the monthly installments paid on shares, and do not include the admission or entrance fee of one dollar per share." By-law 25 provides: "There shall be retained and reserved from the monthly dues paid on the shares the sum of ten cents per month per share for the payment of expenses, to be known as the expense fund. The excesses over and above expenses to go to the profit account." In this settlement the company will concede to you the withdrawal value of your shares as if you were not in arrears. Your dues on stock from March, 1890, to March 1892, at \$3 per month, would be \$75, less expense fund ten cents a share, fifty cents a month, for 25 months, \$12—leaving due \$62.50. Add interest at 6 per cent for average time, 12 months and a half, \$3.40—making \$65.90,

less withdrawal fee \$3—leaving \$62.90. So deducting from \$391, the credit of \$62.90 we have \$328.10 as the amount which the association is now claiming to be due by you. If the same shall be paid without foreclosure you will be relieved of the additional expense ^{sss} of 10 per cent of \$32.10, attorney's fee and expense of sale. Unless you shall at once pay to me the amount due by you to said association, I shall under my instructions proceed to foreclose the deed of trust according to law. I will call your attention to the fact that this contract is solvable in Georgia, and is made with reference to its laws. The courts of Georgia have decided such a contract to be valid and binding.'

"The defendant is organized under the laws of the state of Georgia and an examination of its charter, a copy of which is filed with the brief of its counsel, discloses the fact that the scope of its power is very extensive. 'The object of said association,' it is said, 'shall be pecuniary profit for its stockholders, to encourage the saving of small sums of money, to aid persons of limited means in obtaining homes; the accumulation of a fund which shall be paid in monthly installments by its stockholders, and lending the same on real estate, personal, or other acceptable security to members of said association or to persons not members thereof or to corporations, and to take and hold deeds, mortgages, executions, or other liens, or personal security therefor; to sell, assign, transfer, or otherwise dispose of all such securities or any part thereof; to make, issue, and sell bonds or other obligations, based on the security and property held by the association; to buy, sell, own, and deal in any real or personal property; to improve any such real estate by erecting buildings, machinery, or other appliances for increasing the value thereof, to lease or rent the same, and to sell the same for cash or on installments; also to act as agent or trustee for the investment and management of funds for persons, corporations, administrators, executors, guardians, and trustees. To carry out all of which objects, as well as to do any and all other acts or things necessary and lawful in the prosecution and management of said business ^{ss7} and businesses, petitioners pray to be invested with full power and authority.'

"And by its charter it is given full power and authority to carry out all these objects of its organization.

"Now, if we leave out of our consideration, for the present, all questions about the alleged special powers and privileges

of this corporation, and all questions that pertain to the intricacies of the business of building and loan associations, and the application of payments made by the borrower from such an association on stock in liquidating his indebtedness, we have here a loan of money made by a foreign corporation to a citizen of this state and secured by mortgage on land in this state, at a rate that is plainly usurious under the law here, twelve per cent (six per cent as interest and fifty cents per month as premium), and an insistence by the foreign lender that, because it is stipulated in the contract that it is 'solvable' in the foreign state and is made with reference to its laws, and those laws allow the taking by it of that rate of interest for the loan of money, the courts of this state are bound to enforce such a contract by a decree of foreclosure.

"The proposition challenges careful attention. It is important that foreign capital invested within our borders shall have, to the very utmost, its just dues, and that it shall find our courts ready now, as they have always been, to protect its interest and enforce all its lawful rights. But it is important also that the settled policy of the state should be upheld by its courts, and that schemes which to them seem manifestly adopted merely to evade its usury laws should not be allowed to bring about a virtual abrogation of those statutes.

"If a foreign bank or other lender of money may establish local branches or offices in this state, and through its agents solicit and take application for loans on mortgages of land ~~and~~ here to be sent to the home office to be passed upon and allowed there, and if, because of such arrangement, and the insertion of a statement put in the note or mortgage that the contract is 'solvable' in the foreign jurisdiction and is made 'with reference to its laws,' the courts of this state are required to enforce such contracts, and decree a foreclosure of the mortgage and a sale of the land, that the foreign usurer may have his usury, then surely will it have come to pass that it is no longer true that there is no 'cover or device' by which the wholesome restraints put upon the money lenders by our statutes may be escaped.

"Upon this subject there is in *Martin v. Johnson*, 84 Ga. 481, a most emphatic declaration from the highest court of the state that is the domicile of the defendant corporation. A loan of money had been made by a citizen of Massachusetts through an agent in Georgia to a citizen of the latter

state, secured by mortgage on land there but payable in the former state. It was contended that the rights of the mortgagee were not to be governed by the laws of Georgia in respect to usury, because the note was payable in Massachusetts. The court said: 'If this court should hold that a note made in this state but payable in the state of Massachusetts for money advanced by the agent of a person who resides in Massachusetts could be collected notwithstanding it contained sixteen per cent usurious and unlawful interest, then the law of this state as to usury would be inoperative and useless; the money lenders of those states that have no usury laws, but which allow to be collected any rate of interest contracted for, could flood this state with their agents, and by the loan of money exact the highest rate of interest, even a hundred per cent.'

"It seems, therefore, that the principle for which the defendant corporation contends is denied in the courts of its ~~own~~ own domicile—that a foreign money lender, loaning money in Georgia on mortgage on Georgia land, must be content in a foreclosure proceeding to have the amount due determined by Georgia law.

"The reasons that support the rule there are valid here. The rules of comity require us to allow foreign corporations a standing in our courts to enforce the valid contracts they may have made with our citizens, and all such liens upon property situated within this state as they have lawfully acquired. But that comity does not require that we should allow foreign corporations to enforce contracts here, if such enforcement would be in conflict with our laws, and, being thus in conflict, the enforcement thereof would work against our own citizens, and give to the foreigner an advantage which the resident has not: *Walters v. Whitlock*, 9 Fla. 86; 76 Am. Dec. 607. Much less does it require that we should allow a Georgia corporation to enforce a mortgage loan which is illegal and void by our laws (*Ward v. Sugg*, 113 N. C. 489), while in that state the rule is as stated in *Martin v. Johnson*, 84 Ga. 481.

"It is well settled, so well settled that authorities need not be cited, that a purely personal contract made in one place to be executed in another is to be governed by the laws of the place of performance. This general rule is subject to the qualification that the parties act in good faith, and that the

form of the transaction is not adopted to disguise its real character: Tyler on Usury, 83.

"Now, it seems very manifest to us, considering all the facts and circumstances, that this Georgia corporation required the plaintiff, a citizen and resident of this state, to declare, in the obligation given by him to it for the money loaned him, that the contract was solvable in that state and was made with reference to its laws, not because it was contemplated ^{§§} by either of the parties that the money would be paid there, or that the parties would enforce their respective rights under the contract in the courts of that state, but because this money lender desired to escape the restraints of the laws of this state, and, by this formal declaration inserted in the contract, compel the courts of this state, in a suit for the foreclosure of the mortgage, to adjust the rights of the parties according to the laws of Georgia and the decisions of its courts, and in disregard of the laws of this state and the decisions of this court.

"The by-law in relation to the establishment of local branches is as follows: 'In accordance with the authority conferred in its charter, this association will establish local branches in Georgia and other states at such points as the board of directors may approve. The local branches shall elect their own officers and directors, and may make such by-laws as they desire to govern their own bodies, not inconsistent with those of the parent office. The treasurers of the local branches shall give such bonds to the association for the faithful performance of duties and the prompt remittance of all collections by them as the board of directors of the parent office shall determine in each particular case. They shall receive two per cent on all collections from the local branches made and paid over to the treasurer of the parent office by them.'

"It appears from the record that there was a 'local branch' at Murphy, through which this loan was negotiated. It is evident that the borrower was expected to make his payments to the treasurer of this local board, who was under bond 'to the association' for the prompt remittance of all collections. The by-laws provided for compensation for this treasurer—two per cent of his collections. The local treasurer must be considered the collecting agent of the association. A payment to him must be ^{§§} considered a payment to the association. Asseveration that he is the agent of the local branch,

not the parent company—that he was expected to receive and remit money, not as agent of the lender to whom he had given bond for the faithful performance of his duties, but of the borrower—cannot avail. It is evident that this contract, which the borrower was required to say was solvable in Georgia, was, in fact, to be solved by payments to this local treasurer, and that the form of the transaction was adopted to disguise its real character.

“Considering the transaction, therefore, without any regard to the intricate questions pertaining to what are called building and loan associations, but merely as a loan of money made by a money-lending corporation of another state through its local branch in this state, in the manner detailed in the case on appeal, to a citizen here, we conclude that, in this contest between the parties as to their respective rights and liabilities under the contract, those rights and liabilities must be determined by the laws of this state; that it is in truth a North Carolina contract, to be governed by our laws, and not a Georgia contract, to be governed by the laws of that state.

“If there was no local board and no local treasurer; if the application of this resident of North Carolina for a loan of money to be secured by a mortgage on land in this state, to be executed here, had been forwarded directly to the home office of this foreign corporation, and had been there granted upon the condition that the note or bond given by the borrower should be made payable at the home office, and should bear interest at a rate allowed by the laws of that jurisdiction, but illegal here, it has been declared by high authority that, in a suit to foreclose the mortgage, the decree of foreclosure will limit the recovery of the lender to the rate of interest allowed by the laws of this state. ⁸⁹² Wharton, in his treatise on the Conflict of Laws, section 507, says of the question: ‘Whether, when a mortgage is given as security for a loan, and the mortgage is in one state, and the place of payment of the loan in another, the law of the former state or that of the latter state is to prevail in the settlement of interest’; that it has been frequently litigated in the United States, and ‘with results which, on their face, are irreconcilable.’ And the learned author says: ‘The true test is, Was the mortgage merely a collateral security, the money being employed in another state and under other law, or was the money employed on the land for which the mortgage was given? If

the former be the case, then the law of the place where the money was actually used, and not that of the mortgage, applies. If the latter, then the law of the place where the mortgage is situate must prevail.'

"It is stated in the elaborate brief of the learned counsel for appellant that the authorities cited by Wharton do not sustain the rule thus laid down by him. Among these cases is *Chapman v. Robertson*, 7 Paige, 627, in which it was adjudicated, as stated in the head-notes of that case in 31 Am. Dec. 264, that 'the construction and validity of personal contracts depend on the laws of the place where they were made, unless they were entered into with the view of being performed elsewhere,' and also that 'transfer of land or other heritable property, and the creation of liens thereon, is governed by the laws of the place where such property is situate.' Of this case, Folger, J., said in *Dickinson v. Edwards*, 77 N. Y. 573, 33 Am. Rep. 671: '*Chapman v. Robertson*, 7 Paige, 627, 31 Am. Dec. 264, is a case often cited and relied upon, but it does not impinge the general rule that the validity of a purely personal contract is to be tried by the law of the place of its performance. The learned chancellor concedes that the case would have come clearly under that principle ⁸⁹³ if the contract in suit had been only the personal contract of the defendant; but he holds that, as it was a mortgage actually executed here, by a resident here, upon land here, for money borrowed to be used here, though to be returned elsewhere, the law of this state would fix the legality of the rate of interest reserved, and he further reasons that the contract was partially made here actually in reference to our laws, with an appeal to our courts contemplated by the parties if necessary.'

"A distinction seems thus to be clearly recognized between a contract, 'purely personal,' as for instance a promissory note executed in this state but made payable bona fide in Georgia, and a contract not 'purely personal,' as for instance a loan of money by a citizen of Georgia to a resident here to be repaid in that state and to be evidenced by note, so payable, and mortgage on land in this jurisdiction. In *Jackson v. American Mortgage Co.*, 88 Ga. 756, Bleckley, C. J., speaking of a loan of money made by the defendant to the plaintiff in New York, but secured by mortgage on land in Georgia, where he resided, says: 'There was not one contract for making the notes and another for securing them by a con-

veyance, but a part of one and the same contract was expressed in the notes, and a part in the deed executed at the same time. There was no intention to make a loan without having it secured both by the notes and the deed. It was therefore impossible to accomplish the object without calling in the laws of Georgia as a part of the transaction. New York had no law which could make any contract conveying land situated in Georgia operative or obligatory. As the laws of Georgia would thus be essential with respect to a part of the transaction, that law if possible ought to be applied to the whole. There was no intention to make a mere personal contract, but the scheme was to make one partly personal ^{§94} and partly confined by its very nature to a given situs, to wit, the state of Georgia.' See, also, *Martin v. Johnson*, 84 Ga. 481, which was a suit to foreclose a mortgage, the debt being payable in Massachusetts. It is there said: 'There is a portion of the contract which under no circumstances could be enforced in the state of Massachusetts—that as to the land upon which it is sought to set up a lien. Nor do we readily see how any portion of this contract could be enforced in the state of Massachusetts against a person resident in the state of Georgia.'

"The difference in the contracts makes a difference in the rule applicable to their enforcement. Hence, in *Pine v. Smith*, 11 Gray, 38, it was decided that a note made in Massachusetts and secured by mortgage on land in that state, although payable in New York, was to be construed by the Massachusetts law; and in *Thompson v. Edwards*, 85 Ind. 414, it was held that if A of Indiana borrowed in Indiana, on notes secured by a mortgage on land there, money of a citizen of New York, some of the note being payable in New York and some specifying no place of payment, the contract was an Indiana contract, and the question of its being usurious was to be tested by the law of that state. In *Pancoast v. Travelers' Ins. Co.*, 79 Ind. 172, the notes and mortgage were payable in Connecticut, and the court said: 'It is true that the notes and mortgage are made payable in Hartford in the state of Connecticut. But it is true that they were executed in this state, the mortgagor lives in this state, the lands lie in this state, and from the terms of the mortgage it is clear that the intention of the parties was that the contract was to be enforced in this state. The mortgage could be enforced nowhere else. In such a case the law of this state governs, the

rate of interest being fixed in accordance with the laws of this state.'

*** "The doctrine which Dr. Wharton announces seems to us just and reasonable. It has been repeatedly held that such transactions would constitute 'doing business' in this state, so as to subject the foreign money lender thus conducting himself to a license tax: Murfree on Foreign Corporations, secs. 65, 69, and cases cited. The contention of the defendant corporation seems to us to amount to this: That it must be allowed to do business in North Carolina in total disregard of North Carolina's statutes and the decisions of her courts; that it shall be allowed to take mortgages on North Carolina land from a resident owner for money loaned to the resident, to be used here, and foreclose them in North Carolina courts, where alone jurisdiction for foreclosure could reside and where alone it must have contemplated enforcing its rights if a resort to courts should be necessary, not by North Carolina statutes and the decisions of her courts, but by Georgia statutes and the decisions of its courts; in fine, that it shall be allowed to override, in the courts of this state, the laws of this state and its well-settled policy as to the borrowing and lending of money.

"We cannot accede to this proposition, but, instead, we choose to adopt the doctrine announced by Wharton, quoted above, which seems to us more reasonable, and which he assures us is sustained by the authorities.

"We have, indeed, as it appears to us, an affirmance of that doctrine, in *Commissioners v. Atlantic etc. R. R. Co.*, 77 N. C. 289, where the learned Justice Rodman, speaking of certain bonds which the defendant company had delivered in New York, and which were payable there, and which, it was contended, were 'governed by the laws of New York in respect to the rate of interest,' says: 'These bonds were clearly a North Carolina contract; the precedent debt, which was the consideration, was incurred and payable in North Carolina; *** both parties resided in North Carolina. The bonds — were secured by a mortgage on real property in North Carolina, which could only be enforced through the courts of this state. In our opinion the bonds could legally bear no greater rate of interest than that allowed in North Carolina.'

"Now, if the reason given by this able judge for declaring that these bonds were clearly a North Carolina contract be analyzed, it will be found that the fact that 'both parties

resided in North Carolina' could not have been an important factor, for in *Roberts v. McNeely*, 7 Jones, 506, 78 Am. Dec. 261, it was proved that both parties lived in Salisbury in this state, and yet the contract between them, a promissory note, executed at their residence, but payable in New York, was declared to be governed by the law of that state as to the rate of interest it would bear—to be a New York contract in this respect. The really controlling reason for the conclusion announced so unhesitatingly about that contract seems to have been that the parties manifestly contemplated the courts of North Carolina as the tribunal for the enforcement of the contract, the security, the mortgage, being enforceable, as is there said, only through the courts of this state, and, this being so, the laws of the former must govern the rate of interest.

"We do not deem it necessary to discuss each one of the many authorities cited by defendants to show that our courts must be governed by the decisions of the courts of Georgia in ascertaining what is due, on an accounting, from this mortgagor to this mortgagee. In not one of them, so far as we can see, did the court enforce a contract which was illegal and void by the law of the forum, illegal and void by the law of the place where the contract was made, and illegal and void by the law *rei sitæ*, and valid, if at all so, only by the *lex loci solutionis*.

"*Falls v. United States etc. Co.*, 97 Ala. 417, 38 Am. St. Rep. 194, ⁸⁹⁷ was an action to foreclose a mortgage. The facts were very similar to those in our case. The court decided that 'the contract which gave rise to the present suit is an Alabama contract, and can only be enforced to the extent our statutes permit,' and added: 'Any statute of this state which may be supposed to confer on building and loan associations the right to charge more than eight per cent interest, even if we concede such statutory authority, must be confined in its operation to such corporations as are chartered in Alabama. It cannot be supposed that our legislation had a greater purpose or intent than that.' In that case, as in this, the borrower was required to have paid three months' installment on stock before he could obtain a loan, and yet that court declares that the transaction was 'practically a loan of money,' and quotes from *Uhlfelder v. Carter*, 64 Ala. 527, the following language: 'In determining whether

a contract is infected with usury, its substance and effect, not its form, are material.'

"Holding, therefore, as we must, that the contract of a loan between this mortgagor and mortgagee is governed by the laws of this state, we come to the question, What is due the mortgagee according to those laws?

"We are met at the threshold of this investigation by the contention of the defendant corporation that being a 'building and loan association' it is entitled to exercise the same powers and privileges as if it had been organized in this state according to the provisions of the code, volume 2, chapter 7; that the same effect is to be given to its contract with the plaintiff, as if it were a North Carolina corporation, formed in strict compliance with the provisions of that chapter of the code, and therefore entitled to exercise special powers and privileges.

"'A building and loan association is an organization ~~see~~ created for the purpose of accumulating a fund by the monthly subscriptions or savings of its members to assist them in building or purchasing for themselves dwellings or real estate by loaning to them the requisite money from the funds of the society upon good security': 2 Am. & Eng. Ency. of Law, 604. Mr. Endlich (Endlich on Building Associations, sec. 283), speaking of the proper and legitimate purposes of the creation of such corporation, says: 'To all practical intents, it may be said to be to enable a number of associates to combine and invest their savings to mutual advantage, so that from time to time any individual among them may receive out of the accumulation of the pittances which each contributes periodically a sum, by way of loan, wherewith to buy or build a house, mortgaging it to the association as security for the money borrowed, and ultimately making it absolutely his own by paying off the encumbrance out of his subscription. It is only so far as they serve these purposes and are confined to the objects necessarily involved therein that the acts of building associations fall properly within the powers granted. As soon as they transgress these limits, they are ultra vires.'

"Nearly every state in the Union has a general statute relating to the incorporation of building and loan associations or associations of that class called by some name of similar import. Each of these statutes differs from the other. All agree in this, that the contemplated organizations

are all strictly co-operative in their nature. Professor H. B. Adams, of Johns-Hopkins University, an eminent writer on economics, in his essay on corporations, in volume 13 of Appleton's Encyclopedia (Annual, 1888) speaks of these associations as a 'peculiarly American form of co-operation.' Mr. A. B. Burke, to whom Mr. Endlich acknowledges his indebtedness in a note to section 7 of his work, cited heretofore, has lately used the following language in a journal ⁸⁹⁹ published in the city of Philadelphia: 'As the term "building society" is very indefinite, and as applied to Philadelphia societies an actual misnomer, it is necessary to specify exactly what is meant by such society. The name was first applied to organizations which built houses to be sold. It was also applied to speculative loan associations whose stockholders had no relations with the borrower except that of lenders of money; and more recently it has been applied to "national" loan associations, having agencies all over the Union, and salaried officers and agents. The term "building society" as here used is not intended to apply to any organization of the character above mentioned. It is essential that the true plan should be clearly understood, and that its co-operative principles should be faithfully followed, or those who are tempted to imitate the Philadelphia workingman in buying a house may . . . lose, not only their money, but their faith in co-operative enterprises.'

"If we consider the scope of the powers of this corporation, we find that they far exceed those conferred upon 'homestead and building associations' by the code of this state. The powers conferred upon it have been heretofore fully set out, and need not be repeated. Suffice it to say that it has powers under its charter to do things far exceeding in risk the assisting of its members 'in building or purchasing for themselves dwellings or real estate.'

"If we consider the manner in which its funds are to be raised, we find that it is not by 'accumulating a fund from the monthly subscriptions or savings of its members,' but mainly by inducing capitalists to invest their surplus in one or the other of the kinds of stock provided for in the following by-law: '2. Full pay interest bearing stock in class B, which shall be sold at fifty dollars per share, and which shall bear interest at six per cent per annum, payable semi-annually, ⁹⁰⁰ on fifty dollars per share. This stock shall be redeemable upon maturity of the installment stock in said

class, at one hundred dollars per share, less the aggregate sum of dividend paid thereon.'

"3. Permanent investment stock, which shall be sold at one hundred dollars per share, and which shall participate in the profits of the association from the date of issuing the certificate of stock, to be paid semi-annually, to wit, on the first day of February and August of each year. The par value of all stock at maturity shall be one hundred dollars per share. A member may hold any number of shares.'

"A corporation having the authority to incur such risks and responsibilities, and deriving its funds from such a source in whole or in part, is not a building and loan association except in name. It is merely a money lending, dividend paying corporation, to which, for some purposes, some features of a 'building and loan association' have been attached. Its purposes and powers put it outside of the pale of the beneficent statute which was intended to encourage co-operation among the saving poor, and not to aid the rich in finding good investments for their capital.

"The purpose had in view by the legislation of the different states allowing the incorporation of these building and loan associations, as they are called, is thus stated by Mr. Endlich in section 119 of his work on the laws of such corporations: 'As a mere saving institution, the building association would never have recommended itself to the favor of legislatures to so unprecedented a degree. As a mere bank for the depositing of money lying idle, for the purpose of fructifying it for the rich, by fleecing the needy, it would never have acquired the unusual rights it exercises. But the idea, the possibility, of making membership in it the means of raising a property holding, homestead owning class of citizens, precisely as to those whose improvident habits and petty earnings had hitherto debarred them from ⁹⁰¹ the blessing, or feeling the stimulus of the prospect, of owning their own homes—the desirableness of augmenting the proportion of landowners among the working classes, particularly in a republic, seemed so weighty a consideration in the minds of legislators, that they were willing, in exchange, to make a sweeping exception to many of the best-settled rules of general policy applicable to dealings between man and man.'

"If, as the defendant contends, our statute confers upon building and loan associations those special powers and priv-

ileges, constituting, as the learned author says, 'a sweeping exception to many of the best-settled rules of general policy applicable to the dealings between man and man,' it is certain that no corporation except such a one as is contemplated by the statute can lay any claim whatever to those special powers and privileges.

"A true building and loan association, such as our statute provides for, has no authority to declare or pay dividends on its stock: Endlich on Building Associations, sec. 324. 'As to participation in profits, the scheme has reference to the final adjustment of accounts, not to any intermediate realization.' The defendant corporation has two classes of stockholders to whom, as shown by the by-law heretofore quoted, dividends are to be paid each year, and having power so to conduct its business, is not the kind of an association which our legislature designed to promote. A corporation of that class cannot risk its members' money and houses by engaging in many of those enterprises enumerated in the defendant's charter heretofore set out. The defendant has 'full power and authority' to do all those things. Therefore, it is not of that class, and can lay no claim to those special powers and privileges with any justice whatever.

"In section 39 of Mr. Endlich's treatise it is said that ~~see~~ these associations are founded upon principles of strict mutuality and equality of benefits and obligations. A corporation not founded on those principles cannot be truly a building and loan association within the purview of our statute. The benefits are not strictly mutual and equal where one stockholder, according to the plan of the organization, is entitled to semi-annual interest on what he has paid in, and another to semi-annual dividends, while others must await the termination of the life of the association, or some other time indefinitely future, before reaping any profits. There is no strict equality of obligation where one stockholder pays fifty dollars for a share of stock and another obligates himself to pay one hundred dollars per share.

"'In Maryland a corporation which made its loans to members in the approved form of building association loans, but whose aims and nature did not bring its property within the statute as a building association, was not allowed to enforce reservations lawfully permitted to such institutions': Endlich on Building Associations, sec. 355; *Williar v. Baltimore Butchers' Loan etc. Assn.*, 45 Md. 546. The same doctrine is

established in Pennsylvania: *Jarrett v. Cope*, 68 Pa. St. 67; *Kupfert v. Guttenberg etc. Assn.*, 30 Pa. St. 465; *Rhoads v. Hoernerstown etc. Assn.*, 82 Pa. St. 180.

"The wisdom of this doctrine will be apparent, we think, to all who will consider the possible consequences of a contrary rule.

"For illustration: Let us assume, for the sake of argument, that a building and loan association organized under our statute has a right to loan money to its members at the rate of one-half per cent per month and a like 'premium,' or one per cent per month; that it requires its members to pay sixty cents per month as dues on each share of one hundred dollars, of which ten cents is to go to the expense fund of the association, and enforces prompt payment by a fine of ~~903~~ ten cents per month per share. Let us now suppose that one of those worthy citizens for whose special benefit it is said this 'beneficent statute' was adopted is induced to subscribe for ten shares in one of these beneficent institutions. His first duty is to pay ten dollars for the privilege of being enrolled. Let us assume that the agent who induced him to subscribe takes this for his trouble, and give that particular sum no further consideration.

"Let us now suppose that this member, wishing to become a home owner, selects one to cost fifteen hundred dollars, and, using five hundred dollars, which he had and one thousand dollars borrowed from the association on a mortgage of the property, he takes the title and bravely sets out to battle with the debt he has incurred, to provide a home for his family, in good cheer at the prospect held out to him by the company's agent that at the end of seven years 'at the farthest' his ten shares of stock will be worth one thousand dollars, and that then, by a very simple process of adjusting the accounts, he will at the same moment cease to be a debtor to the association and also a stockholder in it, and the mortgage on his house will thereupon be canceled. Let us assume that the mortgage provides that he will pay 'said monthly interest or premium, fines, and monthly payments on said stock' until the said shares shall become fully paid in and of the value of one hundred dollars each, as the mortgage set out in this record does.

"Now let us suppose that this workingman, at the end of seven years, having promptly, out of his hard earnings, paid each month ten dollars interest and six dollars stock dues to

the association, asks that his stock be exchanged for his debt and his home be disencumbered of its lien, and is told that, while the soliciting agent was no doubt entirely sincere in his belief that the payments thus far made by him would satisfy his indebtedness, those rosy-hued ⁹⁰⁴ hopes constituted no part of the contract; that it stipulated that he should keep up his dreary round of monthly payments until he had fully paid up his stock and it was worth one hundred dollars per share—that, contrary to everybody's expectations, the expenses had been larger than was anticipated, and net profits had been smaller than hoped for, and that his stock was not worth one hundred dollars per share, as the books of the company plainly showed; that, while his engagement was that, if the exigencies of the association required it, he would pay one thousand dollars in stock dues alone, he had in fact only paid five hundred and four dollars (eighty-four dollars times six dollars) on that score, and out of that he had agreed that eighty-four dollars (eight hundred and forty times ten cents) should be used in expenses, leaving, it might be, only four hundred and twenty dollars really credited on his stock account. Let us suppose that, still hoping for good results, he resumes his payments and toils on; that from month to month, from year to year, the happy day when the stock is worth par is put off by accumulating expenses and constantly recurring losses, until, at the end of one hundred and sixty-six and two-thirds months, he insists that his stock dues, at least, in any event, are all paid, because one hundred and sixty-six and two-thirds payments of sixty cents each amount to one hundred dollars, and is told that ten cents of each sixty cents paid in by him had, according to his agreement, been applied to the expenses, and that the association was in debt, and that all the subscriptions for stock, which he was informed constituted a trust fund, must be paid in, and hence, as the expenses of the business, including the interest and dividends paid to certain classes of the stockholders, had consumed all the profits, it would be required of him to pay stock dues for two hundred months, as it takes two hundred times fifty cents to make one hundred dollars. Let us suppose that he continues his payments for two hundred months, and thus, beyond all question, pays all his stock dues, and when he then asks for the application of ⁹⁰⁵ his paid-up stock to the satisfaction of his mortgage debt is told that, while the company was called a building and loan association, it had

acted also as agent or trustee for the investment and management of funds for persons, corporations, administrators, executors, guardians, and trustees—that it had dealt in real estate, and had been engaged in erecting buildings and machinery thereon, and that those enterprises, all of which were *infra vires*, had proved disastrous, and is informed that, though the receiver who had been appointed to wind up the affairs of the corporation would find that his stock was all paid in, and that there was no claim against him on that account, he would also ascertain that the stock of the company was of no value, owing to the disasters that had come upon some of its various undertakings, and that it would be necessary for all mortgagors to continue to pay the interest (twelve per cent) on the amounts advanced to them, until he had collected enough to adjust all the liabilities of the company, or else to take advantage of the option allowed and pay back the whole sum borrowed—one thousand dollars—at once.

“Surely the trusting home builders caught in such toils, might justly exclaim against a statute, called *beneficent*, that would produce such a result. Such an outcome is possible. Of its probability in different degrees it is not for us to judge. The class to which the defendant corporation is by us to be assigned is the point under consideration—whether to the class of money lending, dividend paying corporations of the investors of capital, or to a class of incorporated associations, co-operative in their very nature, and designed by means of such co-operation to foster a home-stead owning class of citizens with little risk to them because of the severe limitations put by the law of their creation upon the corporate powers and purposes. An ²⁰⁶ examination of the charter of the defendant corporation, its methods and powers, leads us unhesitatingly to put it in the first-named category, and to declare that there is no such conformity by it to the building and loan associations of our statute as to entitle it to claim any special rights or powers therein granted to associations organized according to its terms, with the limited powers and the restricted purposes therein set out.

“‘If the charter of a building association, or what is called its constitution,’ says Mr. Endlich, in his work on Building Associations, section 64, ‘contains the grant of power . . . in excess of what the statutes regulating the formation and powers of such organizations sanction, the objectionable grant is simply void. Each such illegal feature may become the

basis of a proceeding by the state against the society, and result in the forfeiture of the franchise.'

"Applying this principle to the case in hand, we have here a corporation calling itself a building and loan association and asserting the possession of special powers and privileges as such, and yet having in its charter or constitution grants objectionable because in excess of what our statute, regulating the formation and powers of such organization, sanctions. We cannot declare these objectionable grants simply void, for the state of Georgia had the right to invest this legal entity of its creation with all of these powers. Each such feature cannot become the basis of a proceeding by this state against the society, and 'result in the forfeiture of the franchise,' for those features are not, it seems, illegal where conferred, and the power of forfeiture which this commonwealth may properly exercise over the corporations of its own creation cannot be applied to this foreign corporation. A member of this association, who should seek in the courts an injunction against the exercise by its managing board of these powers and the ⁹⁰⁷ assumption of the accompanying risks, or should endeavor to hold those officers responsible to him for losses incurred in the exercise of those powers upon the ground that a building and loan association, within the purview of our statute, could not lawfully engage in such business and incur such risks, would be promptly confronted with the reply, not to be gainsaid, that the restraints of our statute could not affect the right and powers of this foreign corporation. Because of these things it must follow that there is no course open to the courts of this state but to declare that the so-called building and loan associations whose charters legally invest them with the powers not contemplated by our statute (2 Code, c. 7) are not building and loan associations within the purview of that statute.

"We come now to the consideration of the defendant corporation's contention that its contract with the plaintiff, 'without reference to the statute specially authorizing it, is not usurious.' Here we may quote the language of O'Neal, C. J., in *Columbia etc. Assn. v. Bollinger*, 12 Rich. Eq. 124, 78 Am. Dec. 463, when speaking of a contract similar to the one we have under consideration: 'How the contract can be anything else than usurious it is difficult to conceive. Indeed, it must task, and has tasked, human ingenuity in every tribu-

nal where the question has been presented to find the reason whereby such a contract could be sustained.'

"The defendant's counsel sets out as the basis of his argument the following facts: '1. The contract of borrowing is separate and distinct from that of subscription, and the obligation to pay monthly dues upon the stock was incurred by the contract of subscription; 2. The money which Meroney received, whether considered as an advancement upon a portion of his stock ⁹⁰⁸ or as a loan, was never to be repaid except by the maturing of his stock at an uncertain time; 3. If Meroney should perform his contract, it would be uncertain whether he would in the end pay more or less than eight per cent interest, upon the statement of an account, with the strong probability in favor of his paying less; 4. His liability to pay a greater rate of interest than eight per cent was caused by his own default, which he might have avoided by simply keeping his contract; 5. Being interested as a stockholder, only three of his five shares having been pledged to the association, Meroney was directly interested in any profits which the company might make upon his loan. It was in the nature of a dealing with partnership funds.'

"As to all this we may say what was said by Mr. Justice Reade in *Mills v. Salisbury etc. Assn.*, 75 N. C. 292. 'We look at the substance,' or what was said by Judge Gaston in *Shober v. Hauser*, 4 Dev. & B. 91: 'It is the duty of courts to look not merely at the words, but at the substance of the transaction; on the one hand, not to be governed by the words, if the substance goes to defeat the provision of the statute; and, on the other hand, not to rely on the words, so as to defeat the contract, if in substance the transaction be legal. . . . In spite of every effort of the courts to carry into complete effect the legislative will, no doubt the true character of usurious securities is very frequently concealed under cunning contrivances, but when that character is seen, whatever may be the contrivance, the court must and will act upon the transaction such as in truth it is.' We see in this whole transaction only a lending of three hundred dollars to the plaintiff at twelve per cent per annum, payable monthly, coupled with an engagement on the part of the defendant that if the plaintiff makes no default in ⁹⁰⁹ his stipulated payments, whether as borrower or stockholder, the defendant would not require the repayment of the sum advanced or loaned to him until the value of his stock reached one hundred dollars per

share, and that in that event three shares of his stock should cancel the debt. A contract for the loan of money is usurious, if the lender reserves the right in any event to collect more than eight per cent and the sum loaned. The liability of the plaintiff to pay a greater rate of interest than eight per cent grows out of the contract. The existence of such liability shows the contract to be usurious. We quote as applicable here the emphatic language of Justice Reade in the case cited above: 'We know of no device or cover by which these associations can take from those who borrow their money more than the legal rate of interest without incurring the penalties of our usury laws. Calling the borrower a "partner," or substituting "redeeming" for "lending," or "premium or bonus" for an amount which they propose to have advanced, and yet withhold, or dues for interest, or any like subterfuge, will not avail. We look at the substance.' The doctrine announced in that case by the learned justice has been consistently followed by all the decisions of this court since that time. It was foreshadowed by the strong language of Chief Justice Pearson in *Smith v. Mechanics' etc. Assn.*, 73 N. C. 372, the first case in which such an association appeared in this court, and in which Mr. William N. H. Smith, afterward chief justice of this court, was of counsel for the association, and filed an elaborate brief in which he argued many of the points now again presented. Yet this learned chief justice, who had himself, as counsel, argued earnestly to the contrary, yielded cordial assent to the doctrine of *Mills v. Salisbury etc. Assn.*, 75 N. C. 292, and the opinions of this court in *Overby v. Fayetteville etc. Assn.*, 81 N. C. 56, and *Hoskins v. Mechanics' etc. Assn.*, 84 N. C. 838, delivered by him, distinctly affirm the rule there ⁹¹⁰ laid down, which is also approved in *Dickerson v. Raleigh etc. Assn.*, 89 N. C. 87, *Pritchard v. Meekins*, 98 N. C. 244, and *Heggie v. People's etc. Assn.*, 107 N. C. 581. Indeed, that the doctrine of *Mills v. Salisbury etc. Assn.*, 75 N. C. 292, is well settled in this state is recognized on all sides. Mr. Endlich says (Endlich on Building Associations, sec. 347) that that case has been consistently followed in cases arising subsequently in this state. And in the American and English Encyclopedia of Law, volume 2, page 612, note, North Carolina is put among those states where the transaction between a building and loan association and its borrowing stockholder is 'considered simply a loan.' The legislative branch of the state government has

tacitly recognized and approved the doctrine of *Mills v. Salisbury etc. Assn.*, 75 N. C. 292, and those cases that follow it; for, though the general assembly has repeatedly convened since the adoption by this court of the rules applicable to the conduct of the business of building and loan associations organized under the statute of 1868-69, it has never seen fit to alter that statute so as in any way to free them from the effect of those rules. If the contract under consideration must, according to the well-settled doctrines of this court, be held to be clearly usurious, though the defendant corporation were a true building and loan association under our statute, much more clearly is it usurious when made by a corporation having, as we have said, no just claim whatever to such special powers and privileges as such associations may be entitled to, if any. Our constitution most wisely provides that: 'No man or set of men are entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services.' Can the legislature grant to a corporation, or to a certain class of corporations, the exclusive or special privilege of charging more than eight per cent for money loaned, while the general law of the state, by which all other individuals and corporations are controlled, declares ^{§11} all such contracts usurious and void. See *Gordon v. Winchester etc. Assn.*, 12 Bush, 110, 23 Am. Rep. 713, where the negative of that proposition is held to be clearly the law, and see, also, *Birmingham v. Maryland etc. Assn.*, 45 Md. 541. Such seems to be the conclusion of this court in *Simonton v. Lanier*, 71 N. C. 498, where, speaking of this constitutional provision, Justice Bynum said: 'The wisdom and forethought of our ancestors is nowhere more clearly shown than in providing these fundamental safeguards against partial and class legislation, the insidious and ever-working foe of free and equal government.' Whatever may be said upon that subject, this is at least clear: the intent of the legislature to confer such a privilege upon a claimant must be entirely free from doubt or it will not be allowed—both the grant and the identity of the grantee must clearly appear.

"It was proper, therefore, that his honor should adjudge that the contract set out in the defendant's answer as that which it claimed the right to enforce by a sale of the plaintiff's land 'was usurious under the laws of North Carolina.' We have declared, for the reasons heretofore set out, that, for the purposes of this action, it is a North Carolina contract,

and that the sum due to the defendant must be ascertained upon an accounting by applying to the disputed items the rules established by the decisions of this court. One of those rules—that one which has been fixed by a long line of decisions and has been repeatedly approved—is, that this court, looking at the substance of the matter, as bound to do, sees in this whole transaction simply a loan of money by the defendant to the plaintiff. In the account taken by the referee under the directions of his honor, the plaintiff is charged with all he received, with eight per cent interest thereon. Entrance fees, stock, dues, and premium must all go to his credit, for, as we view it, all these payments ^{§12} are but parts of the transaction which we have declared to be merely a borrowing and lending of money at an illegal rate. If the plaintiff was to be charged with interest at eight per cent upon the sum loaned him, he was entitled to like rate upon his payments. He should not have been charged with any fines, for this defendant, as we have said, has no right to lay any fines upon its borrower under any circumstances here, and certainly cannot collect fines from the plaintiff because he refused compliance with its illegal demands. Whatever may be the decisions in other states, in this one all these matters are well settled: 2 Am. & Eng. Ency. of Law, 639, note 1. We can see no reason for reviewing at this late day what has been so long acquiesced in by all.

“It may not be improper for us to say, in this connection, that the insertion in such contract as we now have under consideration of a stipulation that in no event should the aggregate of all the sums to be paid by the borrower (interest being allowed to his credit) exceed the sum loaned him and interest thereon at eight per cent per annum, would perhaps entirely relieve all such transactions from the imputation of being usurious. The remedy seems easy. It is insisted with great confidence that the rate which he would be required to pay, if he and his fellow-borrowers would carry out their engagements, will be much less than six per cent. If that be true, no loss can come to the lender by reason of the incorporation of such a stipulation in the contract. It would be merely to make that a part of the contract which is in fact an inducement to it, but an inducement put in such shape as to be of no legal effect to protect the borrower from usurious exactions. The proposition is a simple one. Let the money lending corporations that, under the guise of

building and loan associations, are professing to loan money, in a complicated and somewhat confusing ^{§13} method at six per cent or less, insert in their contract a binding stipulation to the effect that in no event will they exact more than eight per cent, and all trouble and difficulty will vanish. The courts will be content, for the law against the taking of usury will be obeyed. The borrowing mortgagor will be fully protected against illegal and ruinous exactions, and what has been told him with confidence by the lending mortgagee will be, in a measure, legally secured to him.

“The lending corporation cannot reasonably object, for the limit proposed (eight per cent) stands far beyond the rate it assures the borrower it will exact. An objection on its part to the insertion of this safeguard for the home builder would but emphasize the necessity for the rigid enforcement of the rule of the Mills case, showing, as it would, that there was some danger that the exigencies of its business might frustrate all its hope and calculations, and bring to the confiding borrower ruin or disaster.

“In *Taylor v. Van Buren etc. Assn.*, 56 Ark. 340, such a restriction was in the contract between the borrowing member and that association, and the court held that that stipulation relieved the transaction of all charge of taking illegal interest.

“We have proceeded thus far upon the assumption that the promise of the plaintiff borrower to pay the defendant lender for the use of money six per cent as interest and six per cent as premium, so called, was such a contract as would be enforced in the courts of the state of Georgia if it was solvable in that jurisdiction, and made with reference to its laws. The general law of that state makes seven per cent the legal rate, but parties may lawfully contract for eight per cent. Charging interest beyond this limit is illegal. How, then, it can be lawful for the defendant corporation to charge in that state what is clearly the equivalent of twelve ^{§14} per cent, to wit, six per cent interest and six per cent premium?

“We are told that in *Parker v. Fulton etc. Assn.*, 46 Ga. 166, and in *Van Pelt v. Home etc. Assn.*, 79 Ga. 439, the supreme court of Georgia so declared. An examination of the first-mentioned case, which is very fully reported, enables us to see that the Fulton Building and Loan Association was a corporation differing in many respects from the defendant. It

seems to have been a true building and loan association as defined by Mr. Endlich. Its contract with Parker was not identical with that of this defendant with this plaintiff. It differs from it in many material respects. Neither Parker nor Van Pelt was charged six per cent interest and six per cent premium on the money advanced to them. We have not been able to find in any of the cases from the supreme court of Georgia, to which we have been cited, any adjudication upon a contract exactly similar to the one we have here under consideration. In Parker's case, at page 192, the court says of the transaction: 'Whether the scheme, taken as a whole, is or is not a device to avoid the usury laws is a question of fact for the jury under the proof. The court so charged the jury, and the finding is in effect that it was not such a device. We think the jury found rightly upon the evidence.' The evidence in that case was the charter and by-laws of the association and the contract with Parker. *Non constat*, that because it was proper for the jury to find there was no device to evade the usury laws of Georgia in that scheme, upon that evidence, it would be necessary for all juries to find that there was no such device in this defendant's scheme, as evidenced by its charter, by-laws, and contract with the plaintiff. Comity may require that the courts of this state shall adjudge to a citizen of Georgia, suing here upon a purely personal contract solvable in that state a citizen of this state, such a sum as by the laws of ^{§15} Georgia he could there recover on the contract—that the measure of his recovery shall be determined by the *lex loci solutionis*; but surely comity does not require us to assume, in order to give the foreign plaintiff more than our own citizens in like circumstances could recover, that, because the courts of that state had declared one scheme of a genuine building and loan association not usurious 'upon its face,' therefore the law of that state was that the very different scheme of a very different corporation is not usurious. A decision of the supreme court of Georgia (Sept. 17, 1894), *Butler v. Mutual Aid etc. Co.*, 20 S. E. Rep. 101, which has been rendered since the trial and argument of this case, is confirmatory of our view of the law above expressed. In that case, which was an action by the Mutual Aid, Loan and Investment Company of Atlanta, Georgia, against Butler to foreclose a mortgage, such as we here have under consideration, the mortgagor among other pleas

averred: 'It claims to loan money at six per cent per annum, payable and collectible monthly, but under the name of "premiums," which is but another name for usury, collect another six per cent monthly, by such device collecting really twelve per cent per annum, payable monthly on loans; thus, under fancy names, carefully eschewing the name of "interest," which said charges really are, and, with the object and intent to do so, contracting to take and collect a higher rate of interest than is allowed by law.' The lower court, considering no doubt that the principle established by *Parker v. Fulton etc. Assn.*, 46 Ga. 166, was applicable, overruled this plea and gave judgment for the foreclosure of the mortgage, but on the appeal the supreme court says: 'The plaintiff, as indicated by the record, not being a building and loan association, pure and simple, like the one involved in *Parker v. Fulton etc. Assn.*, 46 Ga. 166, the object of which was to enable its members to acquire houses and homes by the payment of small sums monthly, but, on the ⁹¹⁶ contrary, being apparently a composite institution, embracing for its objects insurance, loans, and investments, the plea of usury should have been entertained for investigation and determination by the jury, under proper instructions from the court, as to whether the scheme of the institution as a whole embraced usurious measures and designs, and whether the loan to the defendant was infected with usury or not, and, if so, to what extent.' The record here fully shows that the Atlanta Building & Loan Association is, as we have said, 'not a building and loan association pure and simple, like the one involved in *Parker v. Fulton etc. Assn.*, 46 Ga. 166,' but is what the highest court of its own state has well described as a 'composite institution,' and therefore not entitled to claim benefit under that decision. Thus is swept away the claim of the defendant corporation that by the *lex loci solutionis* it is allowed to charge and collect on its loans six per cent interest and six per cent 'premium.'

"Our attention has been called to the act of 1893, chapter 434, to show that building and loan associations are, as it is said, favorites of our law, and that they are granted special favors by our statute. This is true. And it also seems to be true that our legislature has invited, as it were, foreign associations of that kind to do business in this state under certain prescribed regulations. The act which thus seems to

invite them to come, with the assurance that they shall enjoy privileges and exemptions here not allowed to corporations of other classes, is an amendment to the general law for the incorporating of building and loan associations: 2 Code, c. 7. It is evident that the legislature intended to confine its liberal invitation to those foreign corporations whose powers, purposes, and methods corresponded with the powers, purposes, and methods of home corporations organized under this general law, and that it ⁹¹⁷ did not intend to thus favor corporations the scope of whose powers extended far beyond the limits imposed upon domestic corporations by the act. The powers of a building and loan association organized under our law are very limited. It is a strictly mutual co-operative organization. It cannot borrow money except for specified purposes. It cannot act as a banking institution. It cannot deal in real estate or personal property. It cannot issue bonds. It cannot engage in manufacturing. It cannot act as a trustee or trust company. All these things are ultra vires. If its officers engage in them, and loss follows, they are personally liable to the members. They may be enjoined from engaging in them. If the charter of a foreign corporation, called a building and loan association, shows that these businesses and others of like nature are, as to it, infra vires, then it follows that the privileges and exemptions of the act cannot be claimed by it. The charter, not the name, determines the class to which it belongs.

“In *Isle Royale Land Corp. v. Osmun*, 76 Mich. 162, there was a petition for a mandamus to compel the defendant to file the articles of association of the relator, a foreign corporation, under an act of that state. The mandamus was denied upon the ground that the relator was not such a corporation as the act contemplated. The court said: ‘The method of organizing, the extent and condition of creating, holding, and transferring stock, the authority and constitution of the governing body and the powers and functions of the corporation, and of its constituent members and bodies, are all matters of importance. The secretary of state based his principal objection to filing these papers on the fact that, instead of being organized for mining and treating metals, those were but partial, and to some extent incidental. But this company, as a corporation already organized under foreign laws for ⁹¹⁸ the multifarious purposes named in its articles,

cannot obtain any legal standing by filing its papers under section 23 of the mining law without the subversion of settled principles.' Our statute contemplates the licensing of corporations organized for a certain single purpose, with certain prescribed methods and powers. One organized under foreign laws for multifarious purposes has no right to the license under the act. It can depend for the enforcement of its rights in our forums only on the rules of comity.

"We are not forgetful of the earnestness with which it was argued before us that because, as it was said, large sums of money had been loaned in this state by foreign companies upon schemes similar to that one we have here under consideration, and much other foreign capital stands ready for investment within our borders upon like contracts, it was most important that such transactions should not be declared usurious; and we were told in effect that if our conclusion was as herein declared the foreign lenders would at once proceed to foreclose the mortgages to the great inconvenience of those who had borrowed from them. We cannot change our opinion of the law to suit the exigencies of any occasion. The law applicable to the case in hand and to others of like nature has been, as we think, for a long time clearly settled in this state. In all the legal literature pertaining to the perplexing matters of building and loan associations, so far as we have found, the doctrine of this court is conceded to be plainly stated and consistently followed. We merely reiterate what our predecessors long ago decided. If under these circumstances the lender gets less hire for his money than he hoped for, the blame, if there be any, must rest on those who have acted in defiance of the decisions of this court, not upon us who only decline to reverse those decisions. But can harm come to the lender? Certainly not, unless it is exacting ⁹¹⁹ more than six per cent for the hire of money for that rate it is allowed to collect. How can the borrower be harmed? His mortgage cannot be foreclosed or his lands sold so long as he makes the stipulated monthly or weekly payments set forth in it.

"When these payments, treated as partial payments on the debt, are sufficient to extinguish that indebtedness, the account being taken according to the principle repeatedly announced by this court, the lien on his property will have been discharged, and the courts will decree its formal cancellation. We guard him from unreasonable and perhaps

ruinous exactions in the future. We do not precipitate upon him any new burden. We merely fix a limit when his burden bearing shall in any event cease; and we fix that limit far beyond the line where the lender says he will wish to go. So, the assurance of safety we give to the borrower works no restraint on the lender, and both should be content.

"When this cause was before this court on a former appeal, the sole question was whether there was sufficient ground for enjoining the sale of the plaintiff's property till the controversy could be heard and determined on its merits. The record as then presented contained an allegation on the plaintiff's part that the transaction as detailed in the complaint and answer was contrived to evade the usury laws of this state. We did not consider it at all necessary then to discuss the very important matters involved in this controversy, as it nowhere appeared that they had been passed upon by the court below. The order then appealed from was not erroneous, we said, for the sufficient, but not necessarily sole, reason that there was evidently a 'serious issue' between the parties. We merely declined to reverse an order continuing the injunction in force until the hearing."

220 So far we have adopted the very able and elaborate opinion prepared for the court at last term by Mr. Justice Burwell, but which was not then filed. A reargument was had at this term of this and the cognate case of *Rowland v. Old Dominion etc. Assn.*, 115 N. C. 825, embracing substantially the same controversy. This is five times the questions involved alike in these two cases have received the fullest and most exhaustive argument before the court. It must be conceded that we have not acted hastily, and that we have had at least opportunity to comprehend the points presented in all their bearings. Counsel for defendant frankly admitted in the argument that their clients began business in this state knowing that the decisions of this court in the Mills case, which has for twenty years remained undisturbed by the courts or the legislature, prohibited the mode which they proposed to follow and have followed, but that they came expecting to procure a reversal of that decision. For a party to deliberately and systematically violate the law as it has been announced and continuously recognized by the highest court of the state for a series of years with the avowed purpose of causing the court to take back and reverse its decision under the better instruction of such lawbreaker, is a

proceeding hitherto unknown in this state. The nonresident counsel of the nonresident corporation, who thus admit their deliberate violations of our statutes, used as one of their most persistent arguments to change the views of this court that the combined capital of such corporations mounts up into millions of dollars. It is not the first time that accumulated wealth has demanded exclusive favors and privileges, but it has probably never before been so unreservedly asserted in a court of justice in this state at least. Our revolutionary ancestors anticipated the force, the exactions, the indifference to equality, of overgrown combinations of capital, and ⁹²¹ placed in the bill of rights of 1776 the provision against the grant of exclusive privileges, which remains in our present constitution as a protection to the plain, common people against these excessive claims of money gathering corporations. The opinion of Justice Burwell, above adopted by us, shows how little claim such institutions as this defendant is shown to be have to use the beneficent title of building associations, and that they are in fact thinly disguised banking associations claiming to be superior to our usury law because chartered elsewhere. Such discrimination, if legal, would destroy all our home banks, and other like institutions, which faithfully observe the law limiting the rate of interest, and pay their taxes to the support of the state and county government. Thus freed, if this claim is allowed, from both our taxation and usury laws, the defendant would yet seek to obtain the use of our courts to collect the money which it has secured by mortgage on real estate here. The circumstances would justify sharper criticism than we have so far given to any case before us. The defendant asserts immunity from the restrictions and burdens imposed by law on all others, and at the same time asks the best security given by law and the use of the process of the courts to enforce it. The defendant also called to our attention a bill which it procured to be passed at the last session of the general assembly, and claims that it protects it in the violation of our usury laws. This statute, which is drawn with considerable art, provides in the first section that building and loan associations are restricted to six per cent, which has by a general act of the same legislature been restored as the limitation upon interest. In a subsequent paragraph the association is allowed to charge cost, expenses, interest, premiums, and fines. The controlling idea in the first paragraph restricting these corporations to the six

per cent which is ⁹²² the general policy of the state must govern, and calling these other exactions premiums, penalties, and the like does not make them other than interest, or authorize the exaction of more than six per cent for the totality. A similar case was *Simonton v. Lanier*, 71 N. C. 498. When two constructions of a statute are possible, the court should adopt that which is most reasonable and in accord with the declared and recognized public policy of the state. It would neither be reasonable nor in accord with our recognized policy, nor just to the legislature, to construe that they deemed that public opinion and considerations of justice required that the industries of the state should be protected against the exactions of a greater rate than six per cent for the use of money, and yet that the same legislature provided that combinations of capital might, by dubbing themselves building and loan associations and euphoniously styling their exactions of interest premium, fines, penalties, and the like, exact pay for the use of money without limitations. This would be one law for the rich and another for the poor. Could we hold that the legislature intended to so enact (and they certainly did not) the wisdom of the organic law has placed its ban upon such discrimination and special privileges. A penalty or fine for nonpayment of money is interest. If money is loaned at six per cent and five per cent premium, this is simply eleven per cent interest. The courts have always said that in usury cases they "look through all disguises to the real nature and truth of the transaction." The shifts and devices of avarice are countless in attempting to evade the protection which the lawmaking power sees fit to erect against its exactions. Calling interest by other names, as premiums, fines, and penalties, is a threadbare device, and was laid open in very clear language in our leading case of *Mills v. Salisbury etc. Assn.* 75 N. C. 292, twenty years ago. Recurring to the act of 1895, which ⁹²³ the defendant pressed on our notice as an exemption in its favor, it may be noted that if the legislature could be understood as having so intended it to be, thus overriding the first clause thereof and the general statute as well, and if there were no constitutional prohibition against the grant of such exclusive and special privileges, even then the act in question took effect on March 9, 1895, while the general act prohibiting any one, without exception, to exact more than six per cent for the loan of money took effect April 13, 1895, and would have the effect

of repealing all exceptions and stopping on that date the exaction of a higher rate by the defendant under its prior special act.

Affirmed

AVERY, J., dissents.

USURY—CONFLICT OF LAWS.—Though a corporation is expressly authorized by its charter to charge a certain rate of interest upon its loans, it is not permitted to charge the same rate in a foreign state if that is contrary to the usury laws in force there: *Falls v. United States etc. Building Co.*, 97 Ala. 417; 38 Am. St. Rep. 194; extended note to *Bank v. Cook*, 46 Am. St. Rep. 201.

USURY—HOW DETERMINED.—In determining whether a contract is infected with usury, its substance and effect, not its form, are material: *Falls v. United States etc. Building Co.*, 97 Ala. 417; 38 Am. St. Rep. 194; extended note to *Bank v. Cook*, 46 Am. St. Rep. 178.

USURY—DEVICES TO CONCEAL.—If a transaction is in substance a receiving or contracting for the receiving of usurious interest for a loan, the parties are subject to the statutory consequences, no matter what device they may have employed to conceal the true character of their dealings: Note to *Bank v. Cook*, 46 Am. St. Rep. 179.

USURY.—PENALTIES AS: Extended note to *Bank v. Cook*, 46 Am. St. Rep. 192; also the same note at pages 200, 201.

BUILDING AND LOAN ASSOCIATIONS.—Their purposes and powers are discussed in the extended note to *Bank v. Cook*, 46 Am. St. Rep. 200.

STATUTES—CONSTRUCTION.—Every statute should receive a reasonable construction: *Western Union Tel. Co. v. Williams*, 86 Va. 696; 19 Am. St. Rep. 908; and with reference to the whole system of which they form a part: *St. Louis v. Howard*, 119 Mo. 41; 41 Am. St. Rep. 630, and note.

STATE v. WERNWAG.

[116 NORTH CAROLINA, 1061.]

SALE—PLACE OF.—If a seller of meats residing and doing business outside of a city receives an order from a person residing therein to bring him meats of a certain kind at an agreed price, and the seller delivers the meat and receives payment within the city limits, this is a sale therein violating an ordinance prohibiting the sale of meats within the city without a license.

SALE—PLACE OF—DELIVERY.—In a sale of goods generally the contract is executory, and no property in them passes, and the sale is not complete until delivery.

F. I. Osborne, attorney general, for the state.

1061 MONTGOMERY, J. The city of Asheville, by one of its ordinances, prohibits by fine the sale of fresh meats without

a license first had from the city, within a radius of three-fourths of a mile from the courthouse as the center of the circle except at the market established by the city. The defendant, who lived and conducted the business of a seller of fresh meats outside of the three-quarter mile limit, received a telephonic message from C. H. Southwick, manager of a hotel inside of the limit, to bring to him at the hotel some fresh ¹⁸⁸³ meats, the prices being agreed on. Agreeably to this message the defendant brought, in his own wagon, the meats to the hotel and delivered the same, receiving payment afterward. In making this transaction did the defendant violate the city ordinance and thereby become liable for the fine imposed by the city? We are of the opinion that he did. In the first place the goods ordered were not of a specific character, and therefore the contract was only executory. The witness said, "I telephoned to the defendant to send me some fresh beef and fresh mutton, describing such as I desired." It cannot be doubted that if the meat when delivered at the hotel had not been of the kind ordered, the buyer could have refused to receive it. "Where there is a sale of goods generally no property in them passes until delivery, because until then the very goods sold are not ascertained": Benjamin on Sales, sec. 315. The general rule is that if it is a part of the contract of sale that the seller shall deliver the property sold at some place specified and receive payment on delivery, title will not pass until such delivery: Benjamin on Sales, sec. 325; *Edmondson v. Fort*, 75 N. C. 404.

2. The transaction was executory. The difference between this and a sale is, that in the latter the goods which are the subject of the contract become the property of the buyer immediately upon the conclusion of the contract regardless of delivery, and the risk of loss or injury is upon the buyer; whereas, in an executory contract the title to the goods is in the seller until the contract is executed. If in this case the fresh meats had been lost or destroyed on their way from the defendant's shop to the hotel, how could it be thought that the proprietor of the hotel would be compelled to pay for that which he had never received and which the defendant promised to deliver to him at his hotel in good condition? The plain meaning of this matter ¹⁸⁸³ is this: The hotel manager sent a message to a seller of meats outside of the three-quarter mile limit, "Bring me some fresh meats of a

certain description; if they are such as I order I will take them and pay you for them; if they are not of the kind I order, I will not." Surely there is no sale in this.

8. The transaction cannot be a sale. In a bargain and sale the thing which is the subject of the contract becomes the property of the buyer the moment the contract is concluded, without regard to whether the goods are delivered to the buyer or remain in the possession of the seller: *Lester v. East*, 49 Ind. 588. If by the terms of the contract the seller is required to send or forward the goods to the buyer, the title and risk remain in the seller until the transference is at an end, after which time the title is vested in the buyer: *Bloyd v. Pollock*, 27 W. Va. 75; *Taylor v. Cole*, 111 Mass. 363; *Fry v. Lucas*, 29 Pa. St. 356. The cases of *Armstrong v. Best*, 112 N. C. 59, 34 Am. St. Rep. 573, and *Ober v. Smith*, 78 N. C. 313, are easily to be distinguished from the cases above cited, and the points are not of the same character with those. In *Armstrong v. Best*, 112 N. C. 59, 34 Am. St. Rep. 573, and *Ober v. Smith*, 78 N. C. 313, the orders for goods were written in North Carolina, and sent by letter to Baltimore. The goods were selected by the sellers, and delivered to common carriers, unconditionally, for the purchasers. The delivery to the common carriers completed the contract, and upon that completion our court held that the contract was governed by the laws of North Carolina, and not that the sale was complete when the goods were ordered in North Carolina.

There is no merit in the exception made by the defendant to the court's allowing an amendment to the warrant issued by the mayor. The amendment did not change the nature of the action, and therefore the power of the court to allow an amendment was unrestricted: *State v. Vaughan*, 91 N. C. 532; *State v. Norman*, 110 N. C. 484.

1884 There was no error in the judgment of the court below and the same is affirmed. —

SALES—PLACE OF.—If no place is designated, the place of sale is the point at which goods purchased or ordered are set apart and delivered to the purchaser: *Commonwealth v. Hess*, 148 Pa. St. 98; 33 Am. St. Rep. 810, and note; *Perlman v. Sartorius*, 162 Pa. St. 320; 42 Am. St. Rep. 834, and note. This question is fully discussed in the notes to *Wasserboehr v. Boulier*, 30 Am. St. Rep. 348, and *Ford v. Buckeye State Ins. Co.*, 99 Am. Dec. 670.

SALES—NECESSITY FOR DELIVERY.—The rule seems to be well settled that where the terms of a simple sale of any specific piece of personal property are agreed upon, and the bargain is struck while everything the seller has to do about it is completed, and he has authorized the buyer to take it,

the contract of sale becomes absolute without actual payment or delivery, and the property is in the vendee: Extended note to *Tufts v. Griffin*, 22 Am. St. Rep. 866. Delivery is not essential, as between the parties, to complete a sale of personal property and the passing of a title when nothing remains to be done but for the purchaser to take possession; but as to creditors and subsequent bona fide purchasers, a delivery is indispensable to complete the sale: *Corgan v. Frew*, 39 Ill. 31; 89 Am. Dec. 286; *Hooban v. Bidwell*, 16 Ohio, 509; 47 Am. Dec. 386, and note; *Danley v. Rector*, 10 Ark. 211; 50 Am. Dec. 242; *Griffin v. Chubb*, 7 Tex. 603; 58 Am. Dec. 85, and note; *Call v. Gray*, 37 N. H. 428; 75 Am. Dec. 141, and note; *Kohl v. Lindley*, 39 Ill. 195; 89 Am. Dec. 294, and note.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

PLATT v. JOHNSON.

[163 PENNSYLVANIA STATE, 47.]

LANDLORD AND TENANT—CONDITION IN LEASE—PUBLIC POLICY.—A covenant in a lease that if the tenant shall become embarrassed, or make an assignment for the benefit of creditors, or be sold out at sheriff's sale, the rent for the balance of the term shall at once become due and payable, and shall be first paid out of the proceeds of such assignment or sale, is not against public policy. Under it the landlord is entitled to one year's rent in advance on the distribution of the proceeds of a sheriff's sale of the tenant's property.

D. L. Krebs and H. B. Hartswick, for the appellants.

W. C. Pentz, for the appellees.

48 STERRETT, C. J. The fund for distribution in this case was the net proceeds of Johnson and Petersen's personal property—principally store goods—seized on the premises leased by them from J. S. Seyler & Bro., appellees, and sold on executions in favor of Platt, Barber & Co., the appellants. The only complaint is as to the seven hundred and fourteen dollars, awarded to said lessors as balance of one year's rent due them by their lessees, the defendants in the executions. It is contended by appellants that the extent of the landlord's claim on the fund was two hundred and fifty dollars. This sum was awarded to them by the learned auditor, but on exception thereto the learned judge was of opinion that, upon a proper construction of provisions in the lease, making the entire rent due and payable in advance, they were entitled to one year's rent, less tenants' claim of thirty-

six dollars on account of stable, etc., and he accordingly awarded them the said sum of seven hundred and fourteen dollars.

The lease of the storeroom, etc., occupied by Johnson & Peterson is for the term of thirty-three months from July 1, 1893, at the monthly rental of sixty-two dollars and fifty cents, payable in advance; but it contains the following clauses by which, in certain contingencies, the rent for the entire term would become due and payable: 1. The lessees agree "that if they shall at any time during the continuance of this lease attempt to remove or manifest an intention to remove their goods and effects out of or off from the said premises without having paid and satisfied the party of the first part in full for all rent which shall become due during ^{the} term of this lease, then and in such case such removal or attempt to remove shall be considered fraudulent, and the whole rent of this lease shall be taken to be due and payable, and the said party of the first part shall proceed by landlord's warrant or other process to distrain and collect the whole in the same manner as if by the conditions of this lease the whole rent were due and payable in advance. 2. It is agreed and understood that if second parties become embarrassed, or make an assignment for the benefit of creditors, or are sold out by sheriff's sale, then the rent for balance of term shall at once become due and payable, as if by the terms of the lease it were all payable in advance, and shall be first paid out of proceeds of such assignment or sale, any law, usage, or custom to the contrary notwithstanding."

It was claimed by the lessors that upon the happening of the lessee's embarrassment, seizure, and sale of their personal property—contingencies specified in the last-quoted clause—the entire rent became due and payable out of the proceeds of the sale, so far as the fund would reach.

There is nothing illegal or contrary to public policy in either of the above-quoted provisions. As was said in *Goodwin v. Sharkey*, 80 Pa. St. 149, 153, "the whole rent for the term might have been made payable in advance, and there exists no reason why it might not be made payable at any time during the running of the lease upon the happening of any contingency. The right of distress would immediately arise," upon the happening of the specified contingency; and that right might be exercised by the lessor to the extent of col-

lecting more than one year's past due rent, provided the rights of execution creditors have not previously attached. If they have, the act of June 13, 1836, limiting the lessor's right to payment out of such fund to an amount not exceeding one year's rent, becomes operative in favor of the execution creditors. That a landlord is entitled to claim rent payable in advance out of the proceeds of a sheriff's sale of the tenant's goods upon the demised premises, provided his claim does not exceed one year's rent, is well settled: *Beyer v. Fenstermacher*, 2 Whart. 95; *Purdy's Appeal*, 23 Pa. St. 97; *Collins' Appeal*, 35 Pa. St. 83; and in his claim he is not restricted to the current month or year: *Richie v. McCauley*, 4 Pa. St. 471; *Wickey v. Eyster*, 58 ⁵⁰ Pa. St. 501; *Weltner's Appeal*, 63 Pa. St. 302; nor does it make any difference that, as in this case, no more than a month's rent was originally made payable in advance, if, by force of express covenants in the lease, the whole rent becomes due and payable in advance, upon the happening of certain contingencies, one or more of which have actually occurred before the rights of execution creditors attached: *Goodwin v. Sharkey*, 80 Pa. St. 149, 153; *Owens v. Shovlin*, 116 Pa. St. 371.

In this case the lessees undoubtedly became financially embarrassed before the lien of plaintiff's executions attached, and thus at least one of the contingencies, on which the entire rent became due and payable in advance, actually happened.

Without pursuing the subject further, we are clearly of opinion that there was no error in awarding to the landlords one year's rent, less the thirty-six dollars setoff, etc. There is nothing else in the case that requires further comment. The action of the court below is amply vindicated in the opinion sent up with the record.

Decree affirmed and appeal dismissed with costs to be paid by appellants.

LANDLORD AND TENANT—RENT.—The right of the landlord to reserve title to or a lien on the crops to be raised by his tenant is the subject of the extended note to *De Vaughn v. Howell*, 14 Am. St. Rep. 166.

HICKOK v. STILL.

[163 PENNSYLVANIA STATE, 155.]

TRUSTEES—POWER OF SALE.—A trustee is not permitted to deprive himself of a power of sale conferred for the benefit of the trust; nor to so fetter its exercise by himself or his successor as to defeat the purposes of the trust.

G. S. Patterson, for the appellant.

J. G. Johnson, for the appellee.

¹⁵⁶ **FELL, J.** The case stated is intended to take the place of a bill in equity to enforce the specific performance by the defendant of a contract for the sale of real estate made by his predecessor in the trust. The primary question is whether the agreement entered into by Charles Still as executor was a valid exercise ¹⁵⁷ of the power of sale conferred upon him by the will of Sarah K. Still. The power given is in these words: "I authorize and empower my executor at any time during the lifetime of my husband with his assent, and I direct him immediately upon the decease of my said husband, or so soon thereafter as may be, to sell the whole or any part of my real estate for cash, upon credit or ground rent," etc. On October 20, 1890, Charles Still, executor, agreed with the plaintiff in writing as follows: "That if Geraldine H. Hickok desire to become a purchaser of that piece of ground or land, with house and appurtenances thereon of which she is now lessee and occupier at any time during her leasing of the property, she may do so for the sum of nine (9) thousand dollars, to be paid as follows," etc. The plaintiff was then in possession under a lease from the executor, which did not end until May 1, 1894. Charles Still died February 13, 1892, and letters of administration *de bonis non cum testamento annexo* were granted to Albanus C. Still, the defendant in the case stated, and the appellee. On December 8, 1893, the plaintiff notified the defendant of her intention to purchase under the agreement.

The power conferred is an authority to sell during the life of the husband, and a peremptory direction to sell immediately after his death. As the husband of the testatrix was the executor, and during his life the sole possessor of the power, he might have made a sale deferring the time of settlement. This, however, he did not do. He did not sell the property, but entered into an agreement with the plaintiff,

which gave her the privilege of buying at any time within three and a half years. By this agreement she was entirely free; she was not bound to purchase. But he, and in the event of his death his successor in the trust, was bound to sell to no one else during the period fixed. The vice of the agreement is that it bound the trust estate, no matter what the detriment to it might be, without giving it any corresponding advantage. This was not a use of the power, but a surrender of it for the time. It suspended the exercise of the discretion which had been given the executor, and defeated the direction in the will for an immediate sale upon his death. A trustee cannot be permitted to deprive himself of a power conferred for the benefit of the trust, or so to fetter its exercise by himself or his successor as to defeat the purpose of the trust.

158 We do not find that the question involved has been decided in our cases, but it has been considered in two English cases (*Clay v. Rufford*, 5 De Gex & S. 786, and *Oceanic Steam Nav. Co. v. Sutherland*, L. R. 16 Ch. Div. 236), which, while differing somewhat in their facts from the one under consideration, are decided upon principles which are fully applicable to it. Although they are against his contention, our notice has been directed to these cases by the learned counsel for the appellant with the highly commendable purpose of aiding the court in the examination of a question which is almost barren of authority.

We are of opinion that the contract made with the plaintiff by Charles Still was not a valid exercise of the power of sale conferred upon him by the will of Sarah K. Still, and the judgment of the court of common pleas is affirmed at the cost of the appellant.

TRUSTEES—POWERS.—A trustee, under a deed of trust, has no power to impose new terms or conditions, or to alter, vary, or dispense with those contained in the deed: *Cassell v. Ross*, 33 Ill. 244; 85 Am. Dec. 270; *Hunt v. Townshend*, 31 Md. 336; 100 Am. Dec. 63; *Nicoll v. Ogden*, 29 Ill. 323; 81 Am. Dec. 311.

WERTHEIMER v. THOMAS.

[168 PENNSYLVANIA STATE, 168.]

VENDOR AND VENDEE—NOTICE OF LEASE.—As between a vendor and vendee, the latter is charged with notice of the covenants in a lease of which he knows, but has not examined, and as to the contents of which he has not been misled, but he is not charged with notice of a distinct collateral agreement.

VENDOR AND VENDEE—LEASE AS NOTICE OF OPTION TO PURCHASE.—An agreement by a landlord giving his tenant an option to purchase, though incorporated in the lease, is no part of it, and is not notice to a third party who agrees to purchase from the landlord. If the tenant exercises his option to purchase during his tenancy, such third person may purchase from him, and recover the difference in price from the landlord.

ASSUMPSIT for breach of contract to sell land. The defendants agreed in writing to sell to plaintiff certain premises then leased, the lease having several years to run, and containing a clause giving the tenant an option to purchase the land at twelve thousand dollars. Plaintiff knew of the lease, but not of the option which the tenant subsequently exercised, and under which he received a deed. Plaintiff then purchased the property from the grantee of the tenant for sixteen thousand five hundred dollars, and sued the landlord for the difference between that and the option price. Verdict and judgment for defendants under binding instructions from the court. Plaintiff appealed.

G. P. Rich, for the appellant.

W. P. Bowman, for the appellees.

170 FELL, J. The general rule is that notice of a lease will affect the purchaser of real estate with notice of the covenants contained in it. If with knowledge of a lease he buys without examining it he cannot afterward object that he had no notice of a particular covenant. The equity of a tenant in possession may extend still further, and notice of unusual covenants and even of a collateral agreement to purchase may be imputed to the vendee. This equity, however, rests upon the fact of possession, which is notice to the purchaser of the occupant's title and of the fact that the property is affected, and imposes upon him the duty of inquiry. The purchaser is therefore chargeable with notice not only when the evidence raises a presumption that he knew, but

also when there is just ground for inferring that reasonable diligence would have led him to discover the truth. But this rule of constructive notice by tenancy does not apply to controversies between the vendor and the vendee. Facts which in a controversy with a third party whose rights have been prejudiced by the sale would affect the vendee with constructive notice will not charge him with defects in the vendor's title: 2 Lead. Cas. Eq., pt. 1, p. 145. While the vendee is put to inquiry as to the tenant's title, the duty of inquiry arises because of the possession. In protection of innocent parties the doctrine of implied notice has been carried to its fullest extent. As between the vendor and the vendee, the latter is held to have had notice of the covenants of a lease of which he knew but had not examined, and as to the contents of which he has not been misled, but he is not charged with notice of a distinct collateral agreement.

When the agreement in this case was made, the plaintiff's agent knew that the property purchased was in the possession of a tenant under a lease from the defendant. The agreement was made expressly subject to this lease. Actual notice of the lease carried with it constructive notice of all its covenants and conditions relating to the tenure or intended to secure or enforce the rights and duties of the parties to it as landlord and ¹⁷¹ tenant; but there does not seem to be ground as between the parties for carrying the implication of notice further. The agreement giving the tenant an option to purchase, although incorporated in the lease, was not a part of it. It was a distinct agreement having no necessary connection with the lease. It was unusual and not to be expected. Had this agreement been separate and distinct from the lease in form as it was in substance, it clearly would not have been, as between the parties to this action, notice of the tenant's equity.

We are of opinion that the case should not have been withdrawn from the jury on the ground that the plaintiff was charged with notice of the agreement to sell. That his agent had actual notice, or purposely avoided it, and in fact secured by the agreement only the right to take title to the property in the event of the failure of the tenant to do so, the jury might well have found from the testimony.

The judgment is reversed and a venire de novo awarded.

VENDOR AND PURCHASER.—The purchaser of a lot which is subject to a personal restrictive agreement entered into by its owner is bound by the restriction in a court of equity, unless he was a purchaser in good faith in ignorance of the restriction: *Lewis v. Gollner*, 129 N. Y. 227; 26 Am. St. Rep. 516, and note.

SCHAEFFER v. PHILADELPHIA AND READING R. R.

[168 PENNSYLVANIA STATE, 209.]

CARRIERS OF LIVESTOCK—NEGLIGENCE—LIMITATION OF LIABILITY.—In an action founded on the common-law liability of a carrier to recover for injury to livestock during transportation, the burden of proof as to any limitation thereon by special contract is on the carrier. Unless such limitation is admitted or clearly established by proof, the question is for the jury.

CARRIERS OF LIVESTOCK—NEGLIGENCE—OPINION EVIDENCE.—In an action against a carrier to recover for injury to livestock during transportation, after evidence is presented to show that the animals were in good condition when received by the carrier, that the injuries were of recent occurrence, and not such as they would have inflicted upon each other, except involuntarily by being thrown down and trampled upon, or being jammed together by a collision or rough handling of cars, witnesses who have been for years engaged in shipping such animals, who know their habits and the causes likely to lead to their injury while on cars, and who saw the injured animals when they were unloaded, are competent to express an opinion as to the cause of the injuries.

CARRIERS OF LIVESTOCK—NEGLIGENCE—PRESUMPTION.—Although the rule that injury to the contents of a car raises a presumption of negligence in transportation without direct evidence of accident or improper handling of cars applies, with proper limitations, to livestock, yet it does not apply to injury such as animals voluntarily inflict upon each other, or which can be accounted for, or satisfactorily explained on some ground other than negligent management of the train, nor does it apply in case of death from natural or unknown causes.

J. Snyder and P. S. Zieber, for the appellant.

I. Hiester and D. N. Schaeffer, for the appellee.

213 **FELL, J.** Whether the plaintiffs' mules, which were injured while being carried in a car on the defendant's road, had been shipped under a special contract restricting the defendant's liability as a carrier was a question in dispute at the trial. As the action **213** was founded upon the common-law liability of a carrier, the burden of proof as to any limitation thereof rested with the defendant, and, unless it was admitted or clearly established by proof, the question was necessarily for the jury. That the preponderance of evidence was in favor

of such a limitation would not have justified the court in treating it as an established fact. The question was properly submitted with full and accurate instructions as to the effect of such an agreement if found to exist. This disposes of the first assignment of error, and the remaining assignments may be considered together. They relate to the admission of testimony as to the cause of the injuries, and to the sufficiency of this testimony to sustain a finding for the plaintiffs.

The plaintiffs had a carload of young mules and colts shipped from Cynthiana, Kentucky, to Fleetwood, Pennsylvania. The car was received by the defendant from another railroad company at Harrisburg. When the car reached Fleetwood a number of the mules were found to be seriously injured. To meet any defense based upon the ground of a restricted contractual liability, the plaintiffs assumed the burden of proving that the injuries resulted from negligence while the car was on defendant's road and in charge of its employees. Testimony was presented to show that the animals were in good condition and uninjured when they were received at Harrisburg; that the injuries were of recent occurrence, and not such as the animals would have inflicted upon each other, except involuntarily if they were thrown down and trampled or jammed together by a collision or rough handling of the cars. Witnesses who had been for years engaged in shipping mules, who knew their habits and disposition and the causes likely to lead to their injury while on board cars, and who saw these mules when they were unloaded, were allowed to express their opinions as to the cause of the injuries. The value of their opinions was for the jury to determine, and we see no valid objection to admitting the testimony.

There was no evidence of an injurious accident to the train, nor was there any direct evidence of improper or negligent handling of the cars. Injury to the contents of a car may, however, furnish ground for an inference of want of ordinary care in transportation: *American Express Co. v. Sands*, 55 Pa. St. 140; *Grogan v. Adams Exp. Co.*, 114 Pa. St. 523; 60 Am. Rep. 360; *Phœnix Pot Works v. Pittsburg etc. R. R. Co.*, 139 Pa. St. 284; *Buck v. Pennsylvania R. R. Co.*, 150 Pa. St. 170; 30 Am. St. Rep. 800; *New York Cent. etc. R. R. Co. v. Eby*, 22 Week. Not. Cas. 92. There is no reason why this rule, with proper limitations, should not apply to animate objects. It, of course, would have no application in the

case of injuries which are such as animals voluntarily inflict upon each other, or which cannot be accounted for, or which can be satisfactorily explained on any other ground than that of negligence in managing the train; nor in cases of death from natural causes, or causes entirely unknown, as in *Pennsylvania R. R. Co. v. Raiordon*, 119 Pa. St. 577; 4 Am. St. Rep. 670.

The case on the facts was one of great doubt, but the jury was not left to mere conjecture. The testimony furnished the basis for an intelligent finding, and its submission was free from error.

The judgment is affirmed.

CARRIERS—CONTRACTS LIMITING LIABILITY—BURDEN OF PROOF.—When a common carrier claims exemption from liability for injury to goods under a special contract, the burden of proof is upon him to show that the loss or damage resulted from one or more of the excepted causes in the contract, and without his fault: *Johnson v. Alabama etc. Ry. Co.*, 69 Miss. 191; 30 Am. St. Rep. 534, and especially note. See, further, the note to *Kansas etc. R. R. Co. v. Rodebaugh*, 5 Am. St. Rep. 729.

CARRIERS OF LIVESTOCK ARE NOT LIABLE for injuries resulting from the natural propensity of animals to injure themselves or one another: Notes to *Selby v. Wilmington etc. R. R. Co.*, 37 Am. St. Rep. 639, and *Clarke v. Rochester etc. R. R. Co.*, 67 Am. Dec. 210.

NEILSON v. HILLSIDE COAL AND IRON COMPANY.

[168 PENNSYLVANIA STATE, 256.]

MASTER AND SERVANT—MINOR EMPLOYEE—NEGLIGENCE—QUESTION FOR JURY.—If a minor, who has not reached the age when capacity to see and appreciate danger is presumed, is employed to do one kind of work and then placed at another employment more dangerous in character, it is the duty of the employer to see that he receives such instruction as informs him of the danger surrounding him, to enable him as far as practicable to avoid it. The failure to perform this duty renders the employer liable in case of injury to the servant.

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—SUDDEN PERIL.—A servant, whether minor or adult, without fault on his part, suddenly placed in a position of peril by his employer, is not guilty of contributory negligence in failing to quickly decide and act upon the wisest course to escape the threatened danger.

E. Warren, E. N. Willard, and H. A. Knapp, for the appellant.

C. Smith and L. P. Weidman, for the appellees.

²⁵⁹ FELL, J. The plaintiff, a boy under fourteen years of age, was employed by the defendant at its colliery, and at the time of his injury he was stationed at the head of a breaker to assist in the movement of cars. The loaded cars received from the mine were run to the dump or tippie, and after being emptied were drawn back and shifted to another track. An endless chain moved between the tracks, and the power was communicated from this to the cars by means of a sling-chain some fifteen feet long, one end of which was hooked to the moving chain and the other to the front of the car. When a car had been drawn back the desired distance the chain was unhooked at both ends and carried back to be used in moving the next car. In order to detach the sling-chain it was necessary to stop the movement of the endless chain. When this was done and the sling-chain had become sufficiently slack it was unhooked from the car by the plaintiff and from the endless chain by another boy. The plaintiff in the performance of this work was required to stand on the front bumper of the car. At the time of the accident, because of the failure of the boy who had charge of the moving chain to stop it at the right time, the plaintiff was unable to unhook the sling-chain from the car with one hand while he held fast to the car with the other. In his effort to unfasten the chain he took hold of it with both hands and attempted to jerk it with one in order to get the necessary slack to unhook it with the other. As a consequence of this, when the chain was loosened he fell in front of the car and was injured.

There was testimony that the plaintiff had been employed as a slatepicker, and that a month before the accident he had been directed to work on the cars; that his father on account of the dangerous character of this work had objected to his doing it; that he had been sent back to pick slate and remained at that work until two weeks before he was injured, when without ²⁶⁰ his father's knowledge he had again been sent by the foreman to the cars. The testimony was conflicting as to the dangerous character of the employment and whether the plaintiff had been informed of it and instructed how to do the work so as to avoid its danger.

Two grounds of negligence were alleged upon the trial. The first was in placing a boy of the plaintiff's age, without knowledge or experience, at a dangerous work without such instructions as would enable him to understand it and avoid

its risk. The second was in placing an incompetent boy in charge of the machinery by which the motion of the endless chain was regulated. The case was submitted on the first ground only, the learned judge instructing the jury that there was not sufficient evidence to sustain a finding that the boy in charge of the machinery was incompetent.

While upon its facts the case is a very close one, it could not have been properly withdrawn from the jury. Both the place and the character of the employment were dangerous. The plaintiff had not reached the age when capacity to see and appreciate danger is to be presumed. Under these circumstances it was the duty of the employer to see that he received such instructions as would inform him of the dangers which surrounded him, and would enable him as far as practicable to avoid them. Whether this duty was performed was necessarily a question of fact: *Rummel v. Dilworth*, 131 Pa. St. 509; 17 Am. St. Rep. 827; *Kehler v. Schwenk*, 151 Pa. St. 505; 31 Am. St. Rep. 777. The only ground upon which the plaintiff under the evidence could be charged with contributory negligence was that he attempted to unhook the sling-chain when he found that the machinery had not been applied so as to slacken it, instead of jumping from the car at once. But this was to be determined in view of his knowledge and judgment, and the surroundings. Without fault on his part he was suddenly placed in a position of peril, and he could not be held to the duty of quickly deciding and acting upon the wisest course to escape the threatened danger. Even an adult under the same circumstances would not be held to such a duty.

We find no error whatever in the manner in which the case was submitted to the jury. The charge of the learned judge fully covered every point which was presented or arose at the trial, and the instructions were clear and adequate.

The judgment is affirmed.

MASTER AND SERVANT—MINOR EMPLOYEE—CHANGE OF EMPLOYMENT—DUTY TO WARN—QUESTION FOR JURY.—If a young servant employed in one capacity is injured while performing a different and more dangerous duty, it is a question of fact for the jury whether he had been sufficiently warned and instructed as to the dangerous employment: *Rummel v. Dilworth*, 131 Pa. St. 509; 17 Am. St. Rep. 827. See, also, the note to *Glover v. Dwight Mfg. Co.*, 12 Am. St. Rep. 515, and the extended note to *Fisk v. Central Pac. R. R. Co.*, 1 Am. St. Rep. 29.

CONTRIBUTORY NEGLIGENCE—SUDDEN PERIL.—That one does not adopt the safest and best course to avoid injury when suddenly exposed to great

danger does not make him chargeable with contributory negligence: *Dickson v. Omaha etc. Ry. Co.*, 124 Mo. 140; 46 Am. St. Rep. 429. The law does not require one who is surprised or confused by sudden danger to act according to any fixed rule; Note to *St. Louis etc. Ry. Co. v. Murray*, 29 Am. St. Rep. 39.

SLOAN'S APPEAL.

[163 PENNSYLVANIA STATE, 422.]

LEGACIES—REAL ESTATE WHEN BOUND FOR PAYMENT OF.—The blending of the real and personal estate in the residuary clause in a will binds the real estate for the payment of legacies.

LEGACIES—INTEREST ON.—If the settlement of an estate is delayed by litigation, the pecuniary legatees are entitled to legal interest on their legacies, although the executor is unable to realize that much interest in income from the estate, and the residuary legatees cannot complain, as the estate is charged with the payment of debts and pecuniary legacies first, and not until this is done is the residue ascertained or the extent of their interest determinable.

LEGACIES—INTEREST ON.—After legacies become due and payable they are matured obligations against the estate, and bear interest at the legal rate.

WILLS—REVOCATION OF CHARITABLE BEQUEST BY CODICIL.—If a testator makes a charitable bequest by will, and afterward executes a codicil in which he declares that "I hereby annul and revoke the bequest" to the charity, and "instead thereof I give and bequeath" the same sum to a trustee, to pay the income to two persons during their lives, and, upon their death, to pay the principal to such charity, the codicil does not revoke the bequest to the charity, but only postpones its time of payment.

F. Rawle and E. O. Hinkley, for Rebecca H. Sloan, appellant.

R. J. Byron and A. W. Bomberger, for Josephine Holbach and Mary Perry.

H. S. P. Nichols and J. F. Junkin, for the Presbyterian Orphanage.

J. G. Johnson, for the Pennsylvania Company for Insurance on Lives, executor.

427 **WILLIAMS, J.** The appellant is one of three residuary legatees under the will of James Watt. The testator made two specific gifts of real estate and several pecuniary legacies amounting in the aggregate to about one hundred thousand dollars. He then gave all the "rest, residue, and remainder" of his estate, real and personal, to his three sisters, share and share alike. The personal estate is not sufficient to pay the

legacies, and the first question raised by this appeal is over the liability of the real estate for the deficiency. The court below rightly held that ⁴²⁸ the blending of the real and personal estate in the residuary clause bound the real estate for the payment of the legacies by implication, since "the residue and remainder" can only be ascertained after the payment of the debts, legacies, and expenses. This has been uniformly held in this state: *Hassanclever v. Tucker*, 2 Binn. 525; *Brisben's Appeal*, 70 Pa. St. 405; *Davis' Appeal*, 83 Pa. St. 348. The testator died in 1886. His estate was immediately involved in litigation with one of the legatees, who claimed to be his widow, and this claim was not finally disposed of until 1894, when a compromise was effected and the claim withdrawn. Pending this litigation the executors were unable to realize more than four per cent in income from the estate. The legatees claim interest at the rate of six per cent on their unpaid legacies, and the appellant contends that they ought to receive no more than the estate has actually earned. The learned court below awarded interest at the legal rate. We do not see how it could have done otherwise. After the legacies became due and payable they were matured obligations against the estate, and bore interest, as any other liquidated demands would do, at the rate fixed by law. The estate might have consisted of unimproved city property producing no income whatever. In that event, if the contention of the appellant is sound, the legacies would have borne no interest no matter how long they were withheld. It was doubtless to the advantage of the legatees that the claim of the alleged widow should be adjusted, and they may have acquiesced in what seemed a necessary delay in the settlement of the estate, but unless they agree to forego interest, or to accept a less rate than that fixed by law, they were entitled to demand payment of principal and interest as soon as it was practicable for the executors to make it. The residuary legatees are in no position to complain, for the estate is charged with the payment of the debts and the pecuniary legacies first, and not until this is done is the residue ascertained or the extent of their interest in the estate determinable. The remaining question raised by the assignments of error is over the effect of the codicil upon the bequest to the Presbyterian Orphanage. The will was executed on the third day of January, 1885, and contained the following: "Item (14). I give and bequeath to the Presbyte-

rian Orphanage in the state of Pennsylvania the sum of seven ⁴²⁹ thousand dollars to build a cottage for a school, and to be named the Findlay Highland Home." Some fifteen months later, on the twelfth day of April, 1886, he executed a codicil, the sole purpose of which was to postpone the time when the money should be payable to the orphanage, so that the interest upon five thousand dollars thereof should be payable to Jacob Michael while he lived, and the interest upon the remaining two thousand dollars thereof should be paid to Josephine Holbach, widow, during her natural life, and the principal sum should remain invested pending these lives. For the purpose of making this change, the testator made the Pennsylvania Company for the Insurance of Lives and Granting Annuities a trustee, charged with the investment of the money and the payment of the interest to the annuitants until their respective deaths, and thereupon to pay over the respective sums held for the benefit of the deceased annuitants to the Presbyterian Orphanage for the purposes named in the will. The subject is introduced into the codicil by the words: "I hereby annul and revoke the bequest to the Presbyterian Orphanage in the state of Pennsylvania," and then follow immediately the words: "And, instead thereof, I give and bequeath," to the trustee, for the purposes already stated, viz., for investment and payment of interest to the annuitants during the life of each, and then for the payment of the principal over to the orphanage "to build, or aid in building, said cottage for a school, to be named the Findlay Highland Home." Within one calendar month after the execution of the codicil the testator died, and the position is now taken that the bequest to the orphanage is void under the act of 1855. The contention is that the bequest was revoked by the codicil, and the codicil defeated by the statute, so that the seven thousand dollars the testator intended for the construction of the Findlay Highland Home must now go to the residuary legatees. Whether this is so or not depends on the testator's intention. His intention is to be gathered from the codicil as a whole, read in the light of the original bequest. Looking at the bequest, we find the testator had given the orphanage the sum of seven thousand dollars, to be used for a specific purpose, viz., the erection of a cottage to be used as a school building, and to be called by the name of the Findlay Highland Home. This would have been payable at the end of ⁴³⁰

one year after his own death. The codicil gives the same sum of money, for the same purpose, to be paid on the death of the annuitants. What the testator did, and all that he intended to do, was to change the time for the payment of the bequest, so as to give the interest to the persons named in the codicil while they lived. This is not a revocation. The fact that the testator called it by that name does not make it so. Revoke means to recall, to take back, to repeal. Annul means to abrogate; to make void. The codicil did not recall or make void the bequest in any particular, except as to the time of payment, and this it changed. It left the donee, the gift, and the purpose to which it was to be applied unchanged. If the codicil did not revoke the bequest, then the act of 1855 has no application, and the bequest stands as originally made, changed only as to the time for payment. But, again, the testator says that the codicil is to be "instead of" the bequest in the body of the will. This expression excludes the idea of revocation in its technical sense, and is equivalent to a declaration that, in such particulars as the codicil differs from the bequest, it is to take the place of, or to be instead of, the bequest. 1 Jarman on Wills, 178, states the rule to be that the words "instead of," used in a codicil, are held to mean "instead of so much only as is incompatible with the codicil," and cites several English cases in support of his statement. The codicil is incompatible with the bequest in nothing except the time of payment, and it therefore takes the place of the bequest, or stands instead of it, only in that particular. What the codicil really accomplishes is to provide a small life annuity for two of the testator's friends by withholding the bequest from the orphanage during their lives, that the interest upon it may be paid to them in the mean time. It really diminishes the value of the gift to the orphanage for the benefit of the annuitants, and so falls within the purview of the rule declared in *Carl's Appeal*, 106 Pa. St. 635.

The orphans' court made no mistake in dealing with this question, and the decree appealed from is now affirmed, the costs of this appeal to be paid by the appellants.

LEGACIES—REAL ESTATE, WHEN BOUND FOR THE PAYMENT OF.—Real estate is never charged with the payment of legacies while there is personal property remaining, unless such an intention, together with a direction that the personalty be exempt, is expressly declared, or may fairly be inferred from the language of the will: *Cooch v. Cooch*, 5 Houst. 540; 1 Am. St.

Rep. 161, and note. An intent to charge legacies upon the realty cannot be inferred from the fact that the will provides: "First. After all my lawful debts are paid, I give and bequeath to J. S. the sum of two thousand dollars. Secondly. I give and bequeath all the rest and residue of my real and personal estate to J. C.": *Brill v. Wright*, 112 N. Y. 129; 8 Am. St. Rep. 717, and extended note.

INTEREST ON LEGACIES.—Interest must be allowed on a pecuniary legacy after one year from the testator's death, though the will was not proved until six months after the expiration of the one year: *Ogden v. Pattee*, 149 Mass. 82; 14 Am. St. Rep. 401, and note. Interest may be collected on a legacy from the time the legacy becomes due: *Van Bramer v. Hoffman*, 2 Johns. Cas. 200; 1 Am. Dec. 162; *Glen v. Fisher*, 6 Johns. Ch. 33; 10 Am. Dec. 310; *Custis v. Adkins*, 1 Houst. 382; 68 Am. Dec. 422; *Birdsall v. Hewlett*, 1 Paige, 32; 19 Am. Dec. 392.

APPEAL OF PENNSYLVANIA COMPANY.

[168 PENNSYLVANIA STATE, 431.]

WILLS—POWER OF SALE—RENTS FROM RESIDUARY REAL ESTATE.—A power of sale in a will does not work an immediate conversion of the land as between the executor and the heir or legatee. The title accruing on the death of the testator remains in the heir or legatee until divested by probate sale or the power contained in the will, and the executor has no power to collect rents from the residuary real estate and use them as assets of the testator's estate.

J. G. Johnson, for the appellant.

F. Rawle and E. O. Hinkley, for the appellee.

431 WILLIAMS, J. The question raised by this appeal may be stated thus: Who is entitled to the possession of a testator's real estate after his decease? In the case of an intestate the question would not be regarded as an open one. Upon his decease his personal estate goes to his administrator, but his real estate descends to his heirs at law. What persons shall inherit as heirs at law is a question that has been answered differently by the laws of different countries; but when they have been designated they take at once and in fee *eo instanti* the death of the owner. 432 The course of descent can be broken or changed only by deed or will, for it is a settled principle of law that the heir cannot be disinherited except by express words or by clear implication. The administrator cannot interfere with the inheritance, and if he goes into possession or receives the rents therefrom he holds the same not as the assets of his intestate, but as the agent or trustee of the heir at law: *Walker's Appeal*, 116 Pa.

St. 419. The same thing is true of an executor. He has no estate in the testator's lands by virtue of his office as executor. If rents accruing after the testator's death come into his hands he cannot apply them to the payment of debts or legacies: *Stoops' Estate*, 31 P. L. J. 34; *Fross' Appeal*, 105 Pa. St. 258. The general rule is, therefore, that an executor has no right to the possession of the testator's real estate unless it is given him by the will. An executor or an administrator may sell the real estate for the payment of debts or legacies when the necessity for so doing is made apparent to the orphans' court, and an order is made by that court authorizing such sale, but until then they have nothing to do with it. The testator may, as the testator in this case did, authorize his executor to make such sale, and such authority appearing in the will renders an order by the orphans' court unnecessary. In that case the executor may judge in the first instance of the necessity for the sale, and he may then proceed to make it. The proceeds then become assets in his hands, and he may and must apply them to the payment of debts and legacies. In this case the executor has the rents of the real estate in his hands amounting to about twenty-five thousand dollars, and the residuary legatees ask that it be paid to them. The executor, on the other hand, claims the right to treat this money as assets and apply it to the payment of legacies. The contention is, as we understand it, that residuary legatees, being entitled to appropriate so much only of the property, real and personal, of the testator as remains upon the settlement of all demands against the estate, cannot take possession of the real estate until final settlement has been made and the residue precisely ascertained. But the premises do not support the conclusion. The residuary legatee, like the heir at law, takes the title of the testator upon his death. The title descends under the law to the heir. It comes by gift to the legatee. It comes to both subject to ⁴³² such encumbrances as have been suffered or imposed by the former owner, and the title of both may be defeated or divested whenever the discharge of such encumbrances requires it. It is the "rest, residue, and remainder" only that the heir at law can finally appropriate. The residuary legatee is no worse off. Until actual conversion becomes necessary, the heir, and the residuary legatee as well, is entitled to the possession as an incident to the title, and nothing but a

positive provision in the will can deprive him of it. A power of sale does not work a conversion of the land as between the executor and the heir or legatee: *Blight v. Wright*, 1 Phila. 549; but the title which accrued on the death of the testator remains in the heir or legatee until divested by sale made under an order of the orphans' court, or the power contained in the will. So long as the title remains undivested the right to the possession remains: *Erie Dime Savings etc. Co. v. Vincent*, 105 Pa. St. 315. If the executor collected the rents under an agreement with the residuary legatees that the amount received should be held as assets, and used in the payment of the pecuniary legacies, this agreement should have been proved and relied on in the court below. No such agreement was shown. It is urged that a power to sell authorizes the executor to take possession, else he could not give possession to the purchaser. The reply is that the residuary legatees do not question his right to take possession for the purpose of making a sale. What they deny is his power to collect the rents and use them as assets of the testator. In this we think they are right, and the learned orphans' court committed no error in sustaining their contention.

The decree is affirmed, the appellant to pay the costs of this appeal.

WILLS—POWER OF SALE—TITLE TO PROPERTY.—The fee passes to the heirs until a sale by the executors, under a provision in a will that all the testator's lands shall be sold, and after payment of the debts the proceeds shall be divided between the heirs: *Thomson v. Gaillard*, 3 Rich. Law, 418; 45 Am. Dec. 778; *Nodine v. Greenfield*, 7 Paige, 544; 34 Am. Dec. 363. If an executor is made residuary legatee, and is also given power to sell all real and personal estate, realty forming a part of the residuary estate vests in him, subject to be divested by the sale, and until such sale the rents and profits belong to him as such legatee and not to the heirs at law: *Brown v. Baron*, 162 Mass. 56; 44 Am. St. Rep. 331.

PHILLER v. PATTERSON.

(168 PENNSYLVANIA STATE, 468.)

BANKS AND BANKING. — A CLEARING-HOUSE ASSOCIATION organized by national banks in a certain locality to facilitate the settlement of daily balances between them, involving no element of speculation, and no business undertaking by or on behalf of such banks, is not a violation of the statutes of the United States relating to national banks, and does not transcend the limits which these statutes have drawn about the business of banking.

BANKS AND BANKING—CLEARING-HOUSE — HOLDER OF NEGOTIABLE SECURITIES.—A clearing-house association formed by national banks solely to facilitate the settlement of daily balances between them, without handling and counting the cash in every instance, may require each bank to deposit with certain persons, called the clearing-house committee, a sum of money, or its equivalent in good securities, to be used in the payment of balances, for which the committee shall issue certificates, to be used in lieu of the cash they represent; and may authorize the committee to receive from any member of the association additional deposits of bills receivable and other securities, and issue certificates therefor. The committee then become holders for value of securities and notes deposited with and receipted for by them, and for which they have issued certificates, and as such are not affected by equities existing between the original parties thereto.

NEGOTIABLE INSTRUMENTS—ACCOMMODATION PAPER.—A person for whose accommodation a note is given may use it in any way to accommodate himself, and after he has so used it the maker or indorser is bound by his action, and becomes liable for the amount of the note according to its terms, and cannot defend against the indorsee or holder on the ground that the note is without consideration.

NEGOTIABLE INSTRUMENTS — ACCOMMODATION PAPER — DEFENSES. — As against a holder for value an accommodation maker of a note can defend only on the ground of actual payment. The fact that it is made for accommodation, and without consideration, is immaterial.

NEGOTIABLE INSTRUMENTS — ACCOMMODATION PAPER.—NOTICE to a bank discounting accommodation paper, that the indorser is lending his credit to the maker does not affect the bank or relieve the indorser.

ASSUMPSIT on an accommodation note made by the defendant, indorsed by one Bailey, delivered to one Kennedy, and by him deposited with the clearing-house committee of a clearing-house association. Judgment for plaintiffs. Defendant appealed.

M. H. Todd, for the appellant.

A. T. Freedley, for the appellees.

479 **WILLIAMS, J.** Two lines of defense were taken in this case in the court below. The first of these denied the capacity of the plaintiffs to sue, and was brought to the attention of the learned judge by a prayer for instructions to the jury

“that under the evidence in this case, and the statutes governing national banks, the plaintiffs cannot maintain the pending action against the defendant.” The second alleged that the note sued on was made for the accommodation of F. W. Kennedy, president of the Spring Garden ⁴⁸⁰ National Bank, and that the plaintiffs were chargeable with notice of the want of consideration as between the maker and F. W. Kennedy. The first of these lines of defense makes it important for us to consider and determine the character and objects of the clearing-house association, the distinction to be taken between it and the clearing-house, and the functions and powers of the clearing-house committee. An examination of the constitution or articles of association adopted by the banks forming “The Clearing-house Association of the Banks of Philadelphia” shows the character and objects of the organization very clearly. In substance these articles amount to an agreement with each other by thirty-eight national banks in the city of Philadelphia to facilitate and simplify the settlement of daily balances between them, for their mutual advantage. This agreement substitutes a settlement made at a fixed time and place each day, by representatives of all the members of the association, in the place of a separate settlement by each bank with every other made over the counter. No other object is contemplated or provided for. The association does not provide for any united action for any business purpose. It does not contemplate the employment of capital or credit in any enterprise. It proposes and provides for co-operation to expedite and simplify the transaction by each member of the association of its own proper business in one particular, viz., the settlement of daily balances with the other national banks doing business in the city. Incidentally, co-operation in this particular would tend to bring the banks belonging to the association into closer relations, enable them to become more familiar with the volume of business, and the actual condition of each other, and open the way to make them mutually helpful in times of financial stringency; but these results are incidental only. The clearing-house association is nothing more nor less than an agreement among thirty-eight national banks to make their daily settlements at a fixed time and place each day. To carry this agreement into operation it became necessary to determine the place and hour at which the settlement should be made. A suitable room was secured,

fitted up with desks and other necessary appliances at the expense of the associated banks, and a manager chosen to preside over it and direct the action of the clerks and runners when in session. ⁴⁸¹ This room is the clearing place, or, in the language of the constitution of the association, the clearing-house. It is the place where the representatives of the several banks meet, and where all balances are struck and settled daily between the banks composing the association.

At the close of each meeting the amount due to and from each bank is definitely ascertained. The debtor banks then pay over to the manager the gross balance due from them to settle their accounts with all the members of the association, and he makes distribution of the sum so received among the creditor banks entitled to receive them. The clearing-house is therefore not a business organization, a corporation, a partnership, or an artificial person of any sort, but a place in which the thirty-eight members of the association settle with each other daily. We come now to consider the committee and the position in the general scheme occupied by it. Among the economies in time and labor contemplated by the banks was a settlement of daily balances without the necessity for handling and counting the cash in every case. To provide for this the banks agreed that they would deposit in the hands of certain persons, to be selected by them and to be called the clearing-house committee, a sum of money, or its equivalent in good securities, at a fixed ratio upon their capital stock, to be used for payment of balances against them. For these sums the committee was to issue receipts or certificates in convenient sums, and these receipts or certificates were to be used in lieu of the cash they represented, which remained in the hands of the committee pledged for the payment, when payment became necessary, of the certificates. The committee held the funds and securities deposited with them in trust for the special purpose of securing the payment as far as they would reach of the balances due from the bank making the deposit. On September 24, 1873, the associated banks entered into another agreement with each other by which, "for the purpose of enabling the banks, members of the Philadelphia Clearing-house Association, to afford proper assistance to the mercantile and manufacturing community, and also to facilitate the interbank settlements resulting from the daily exchanges," they authorized the committee to receive from any member of the association

additional deposits of bills receivable and other securities, and issue certificates therefor "in ~~an~~ such amount and to such percentage thereof as may in their judgment be advisable." The additional certificates, if issued, they agreed to accept in payment of daily balances at the clearing-house on the condition that the securities deposited therefor should be held by the committee "in trust as a special deposit pledged for the redemption of the certificates issued thereupon." The committee were made, both by the original articles of association and by the additional contract of 1873, trustees or agents for all the members of the association, with authority to accept deposits in money or securities and to issue their own receipts therefor, the money or securities remaining in their hands in pledge for the redemption of the receipts or certificates so issued by them. When a bank to which certificates had been issued under the original plan or the contract of 1873 failed to redeem them when their redemption became necessary, it was the duty of the committee to collect the securities in their hands and apply the proceeds to the payment of the holders of the certificates. The deposits were made and the certificates issued under an unconditional pledge of the securities to the committee for the payment of the certificates, and their title could only be divested by the payment of the sums for which the securities were pledged. The entire plan on which the settlements are made is therefore a device adopted by the banks to facilitate their legitimate business as banks, and involves no element of speculation, and no business undertaking by or on behalf of the associated banks. We are unable, therefore, to see in what respect these banks have violated the statutes of the United States relating to national banks, or have transcended the limits which these statutes have drawn about the business of banking. They have diverted none of their funds, embarked in no new undertaking, entered into no business alliance, but devised and adopted what seems to be an improved method for doing a portion of their own necessary work. This same method, or one identical in general outline, has been adopted by the banks in every great city in the United States and by many in other lands; and, as far as I am aware, it has nowhere been held that the method is illegal. On the contrary it has recommended itself by its economy of time and labor to the several banks, and, by its incidental results in promoting mutual

helpfulness and confidence, has come to be regarded with favor by the general public. The first line of defense was therefore properly held to be untenable by the court below, and the assignment of error to that ruling cannot be sustained. The second line fails with the first. If it was not a violation of law for the banks to arrange for their own daily settlements in the manner provided by the clearing-house agreement, then the committee became holders for value of the securities deposited with and receipted for by them, and as such are not affected by equities existing between the original parties to the promissory notes or other negotiable securities for which they have issued certificates. But if they could be regarded as fixed with notice of the character of the note it is not easy to see how the fact that the note now sued on was made for the accommodation of F. W. Kennedy can avail the defendant. The committee are certainly holders for value, and hold the note in pledge for the payment of its face in cash. Let us suppose they knew when they took it that it had been made and delivered to Kennedy for his accommodation. The very object of making an accommodation note is that the person for whose accommodation it was made may use it in the way that will best accommodate him. When it has been so used by the holder the accommodation maker or indorser is bound by the action of his friend, and becomes liable to pay the amount of the note according to its terms: *Moore v. Baird*, 30 Pa. St. 138; and he cannot defend against the indorsee on the ground that the note was without consideration, for to permit this would defeat the purpose for which he loaned his credit: *Cozens v. Middleton*, 118 Pa. St. 622. As against a holder for value an accommodation maker can defend only on the ground of actual payment. The fact that it was without consideration and made for the accommodation of him who negotiated it is immaterial: *Miller v. Pollock*, 99 Pa. St. 206. Accommodation indorsers often show the character of their indorsement by a direction made upon the face of the note to credit the proceeds to the drawer, but the fact that the bank discounting had notice that the indorser was lending his credit to the maker has never been thought to affect the bank, or to relieve the indorser.

The evidence offered at the trial to show that the note was without consideration and given for the accommodation of F. W. Kennedy, by whom it was used in exactly the manner

that must ⁴⁸⁴ have been contemplated when it was given, was properly rejected. It might have been competent if the action had been brought by Kennedy, but as against a holder for value it was inadmissible. This question was ruled on in the very recent case of *Philler v. Jewett*, decided at the present term.

The judgment is now affirmed.

ACCOMMODATION PAPER—DEFENSES—MISAPPLICATION OF.—An indorsement made for the accommodation of the maker upon his assurance that the instrument would be negotiated only in another state cannot be enforced against the indorser if, contrary to agreement, it is negotiated in this state to one who has not parted with anything, and who received it merely as additional security for an antecedent debt: *United States Nat. Bank v. Ewing*, 131 N. Y. 506; 27 Am. St. Rep. 615. When the payee of a sealed accommodation note receives it subject to the restriction that it is to be used only in obtaining a loan, he cannot pledge it for an antecedent debt, but if he receives it without restriction as to its use, he may so pledge it: *Altoona Second Nat. Bank v. Dunn*, 151 Pa. St. 228; 31 Am. St. Rep. 742, and extended note at pages 745, 748. See, also, the notes to *Parker v. Sutton*, 14 Am. St. Rep. 796; *Second Nat. Bank v. Howe*, 12 Am. St. Rep. 747, and *Fetters v. Muncie Nat. Bank*, 7 Am. Rep. 228.

ACCOMMODATION PAPER—DEFENSES—WANT OF CONSIDERATION.—The maker of an accommodation note delivered to the payee to be discounted for his benefit cannot set up want of consideration as a defense against the holder for value: Extended note to *Altoona Second Nat. Bank*, 31 Am. St. Rep. 745.

OMSLAER v. PITTSBURG AND BIRMINGHAM TRACTION COMPANY.

[168 PENNSYLVANIA STATE, 519.]

STREET RAILWAYS—NEGLIGENCE AT CROSSING—DUTY TO LOOK AND LISTEN.

A person about to cross the tracks of a street railway operated by steam, cable, or electricity is bound to "look and listen." A failure to observe this rule is negligence per se.

STREET RAILWAYS—NEGLIGENCE AT CROSSING—DUTY TO STOP, LOOK, AND LISTEN.—A person about to cross the tracks of an electric street railway who cannot see an approaching car because of obstructions in the street not caused by the railway company, and who cannot hear the car because of the noise made by a wagon moving in front of him, is bound to "stop, look, and listen" before attempting to cross the tracks. A failure to do so is negligence which bars a recovery for injury received from being struck by the approaching car.

J. S. Young and S. U. Trent, for the appellant.

W. D. Evans and G. C. Wilson, for the appellee.

⁵²⁰ McCOLLUM, J. The plaintiff was injured while crossing the railway tracks of the defendant company on Smithfield street at the intersection of said street and First avenue in the city of Pittsburgh. There were two tracks on the street known as the north and south bound tracks, and upon them electric cars were run in opposite directions to accommodate the travel on that crowded thoroughfare. The plaintiff approached these tracks on First avenue west of Smithfield street, and on nearing the crossing he had such a view of the street south of the avenue as satisfied him that there was no car on the north-bound track which would delay his passage over it. The south-bound track was on the west side of the street and between him and the north-bound track, and his view of the former was so obstructed by an ice-wagon and by piles of lumber and brick that he could not see more than fifteen feet of it north of the avenue, nor more than twenty-five feet of it from his point or place of observation. For these obstructions the defendant company was not responsible. Ahead of him, and moving in the same direction, was a wagon loaded with iron, and the noise created by it was sufficient to drown the noise made by an approaching car. Without stopping to listen or wait a moment for the abatement of the noise which prevented his hearing, he drove upon the tracks, a south-bound car struck the left hind wheel of his buggy, and he was thrown from it to the ground. For the injury thus received he sought, by this action, to obtain compensation from the defendant company, and he was turned out of court on the ground that the injury was the result, in part at least, of his own carelessness. While we sympathize with him in his misfortune, ⁵²¹ we must recognize and enforce the well-settled legal rule that he cannot charge another person, natural or artificial, with the consequences of his own negligence. If, therefore, his driving upon the track, under the circumstances shown by the undisputed evidence submitted by him, was a negligent act, wholly or partially responsible for his injury, the judgment of the trial court must be sustained. This is so although the negligence of the defendant company may have contributed to the occurrence. Mutual fault gives no right of action to either party for a loss or injury occasioned by it.

The rule of "stop, look, and listen" before attempting to cross the tracks of a steam railroad is inflexible, and non-observance of it is negligence per se. So much of this rule

as requires a person about to cross the tracks of a steam railroad to "look and listen" to discover whether a train is approaching is applicable to the crossing of a street railway operated by cable or electricity: *Carson v. Federal Street etc. Ry. Co.*, 147 Pa. St. 219; 30 Am. St. Rep. 727; *Ehrisman v. East Harrisburg etc. Ry. Co.*, 150 Pa. St. 180, and *Wheelahan v. Philadelphia Traction Co.*, 150 Pa. St. 187. There is no settled rule which demands that he shall stop before crossing a street railway, nor does it appear desirable that there should be. Such a rule would materially interfere with travel on the street, and ordinarily there would be no occasion to apply it, because on nearing the crossing his sight and hearing would sufficiently advise him whether there was opportunity for safe passage over it. There may be, however, situations in which ordinary care would require that he should stop as well as look and listen before attempting to cross. The plaintiff was confronted by such a situation. He could not see the approaching car because of the obstructions in the street, and he could not hear it because of the noise made by the wagon before him. As the wagon was moving from him a brief stop would have removed the obstruction to his hearing, but he did not make it. He drove upon the track with the consciousness that there might be a car which he could neither see nor hear approaching the crossing in the usual manner within thirty feet of him, and in so doing he exposed himself to a risk which, under the circumstances, he must be considered as having voluntarily and intelligently assumed. It was a negligent and hazardous act, and there was no attempt to show any circumstances ⁵²² which justified or excused it. It clearly contributed to, if it was not alone responsible for, the injury he received.

The specification of error is overruled and the judgment is affirmed.

STREET RAILWAYS—NEGLIGENCE AT CROSSING—DUTY TO STOP, LOOK, AND LISTEN.—A person about to cross a street railway track need not stop, but he must look and listen, so as to avoid walking or driving in front of a moving car; and, if he fails to so look and listen, he is guilty of contributory negligence, and cannot recover for injuries resulting from being struck by the car: *Carson v. Federal Street etc. Ry. Co.*, 147 Pa. St. 219; 30 Am. St. Rep. 727, and note; *Mages v. Consolidated etc. Ry. Co.*, 102 Mich. 107; *ante*, p. 507, and note.

LIGHT v. COUNTRYMEN'S MUTUAL FIRE INS. CO.

[100 PENNSYLVANIA STATE, 310.]

FIRE INSURANCE—INSURABLE INTEREST.—If a vendor sells land on which insured buildings stand and parts with all his title, he thereafter has no insurable interest in the buildings, and the mere holding of a judgment for part of the purchase money does not confer an insurable interest, and no recovery can be had on a policy given for the protection of the judgment.

FIRE INSURANCE—INSURABLE INTEREST—ESTOPPEL.—If a policy of insurance exists upon buildings at the time the land upon which they stand is sold and conveyed, and it is continued in force in favor of the vendor by a voluntary agreement between himself and the insurer, and the assessment and collection of premiums up to the time of the loss of the buildings by fire, the insurer is liable for the loss, and estopped from asserting a want of insurable interest in the vendor.

ASSUMPSIT on a policy of fire insurance. Plaintiff, being the owner of land on which was erected a barn, insured it against loss by fire in the defendant company. While the policy was in force he sold and conveyed the premises. Before delivering the deed he took it and his policy to the secretary of the insurance company, and asked his advice as to how the insurance could be so fixed as to be retained by him as security for a purchase money judgment given in part payment for the property. The secretary advised him to hold the policy as it was, that future assessments would be sent to him, and that after he had paid such assessments, and the purchaser had paid the judgment, the policy could be transferred to the latter. The plaintiff thereafter paid assessments on the policy up to the time of the fire, and then brought suit to recover for the loss. The defendant set up as a defense a want of insurable interest in the plaintiff. Judgment for defendant. Plaintiff appealed.

G. B. Schock and T. H. Capp, for the appellant.

J. M. Funck and J. G. Adams, for the appellee.

313 **GREEN, J.** There is no doubt that when Light sold and conveyed the land on which the barn in question stood he parted with all his title, and, after that, he had no insurable interest in the barn. It is equally true that the mere holding of a judgment for part of the purchase money of the property sold would not confer an insurable interest, and no recovery could be had on the policy for the protection of the judgment: *Grevemeyer v. Southern Ins. Co.*, 62 Pa. St. 342; 1 Am. Rep. 420.

The learned court below ruled the case finally on the proposition that the plaintiff had no insurable interest in the barn at the time of the fire, and therefore could not recover.

But the ruling on that question does not dispose of the case. There was raised upon the record a question of estoppel, and if the facts which make out an estoppel were established by the testimony then another question altogether arose. The function of an estoppel is to prevent the party who is bound by it from alleging the truth of the matter against which he is ²¹⁴ estopped. In other words, although he may have a perfectly good defense he can neither plead it nor prove it. He cannot assert it against the adverse claim.

In this case it is only necessary to inquire whether the facts which establish an estoppel against the defense of want of insurable interest in the plaintiff appear on the record. The plaintiff, being examined in his own behalf, testified: "When I had sold this property and had the papers, then I took the papers and took the insurance policy with it, the deeds for the property and the judgment which I had drawn, and insurance policy. I went to Gettle, the secretary of the company, to get an advice what to do with this policy, so that it would be good. He said you could transfer this, but you have an insurable interest in it as it is, and you had better hold the policy as it is and the assessments will be sent to you; then you will be sure that they are paid, and after Tice pays you you can transfer the policy to him. Q. What did you do in accordance with that advice? A. So then I held the policy and did n't transfer it. Q. Did you deliver the deed, then? A. Yes. . . . Q. In accordance with that arrangement did they afterward send the assessments to you? A. Every year. Q. And did you pay them? A. Yes, sir."

The plaintiff then proved that three assessments were subsequently, in the years 1890, 1891, and 1892, levied upon his policy by the company and sent to him for payment, and that he paid them all. In all this testimony the plaintiff was substantially corroborated by the defendant's secretary, Gettle, as to the original transaction, and by their secretary, Bomberger, subsequent to Gettle, as to the assessments and their payment. There was no real controversy about these facts, and the jury has found them under the charge of the court.

It appears, therefore, by the testimony and the verdict that the plaintiff, under the advice of the secretary of the com-

pany, continued to hold his policy; that he delivered the deed to the purchaser without transferring the policy; that the company subsequently, during three consecutive years, treated the policy as continuing in force, declared assessments upon it to cover losses, and accepted payment of the assessments from the plaintiff during all that time. They of course knew of the sale of the property, and that the policy was retained by the plaintiff, ³¹⁵ and they undoubtedly treated it as an existing, active policy in full life up until the time of the fire. Can they be permitted now to repudiate their own voluntary action, and assert that it was a void policy for want of an insurable interest in the plaintiff at all times after the deed to Tice was delivered? We think certainly not. To permit such a defense to be made would be highly inequitable and unjust.

The policy was a perfectly good and lawful contract of insurance when it was made, and continued so to be without question up to the time of the sale, and both parties continued to treat it as such until the time of the fire. It was never an instrument void *ab initio*, as was held by the court below, and therefore never needed an infusion of new life. It is in no sense analogous to the case of a policy effected originally by a judgment creditor, nor to a policy held over after a sale voluntarily by the insured. But it was a valid existing policy at the time of the sale, continued in force by the voluntary agreement of both parties to the time of the fire. We cannot see how a clearer case of estoppel than this could be made out in any cause.

In the case of *Mentz v. Lancaster Fire Ins. Co.*, 79 Pa. St. 475, the company's agent told the policy-holder that the proper indorsement on the policy had been made, and we held the company bound by the declaration of their agent on the principle of estoppel. Said Sharswood, J., delivering the opinion: "Now, such a declaration made by a duly authorized agent or officer would clearly operate as an estoppel. It lulled the party to sleep by the assurance that the conditions of the policy had been complied with, and that his indemnity was secured." The present case is much stronger than this, because here the company fully ratified the action of their secretary by treating the policy as actually in force, and declaring and collecting assessments upon it for three years after the sale. If it was in force for the purpose of collecting assessments upon it, it was certainly in force for the purpose of

paying the loss, for securing indemnity against which those assessments were paid by the plaintiff and received by the defendant. In our opinion it would be perpetrating a gross wrong to take any other view of the undoubted facts of the case.

In *Wachter v. Phoenix Assur. Co.*, 132 Pa. St. 428, 19 Am. St. Rep. 600, the insured went to the agent of the company, informed him of the sale of the property, inquired in regard to the transfer of the policy to Wachter, the mortgagee, and was assured by the agent that it was all right as it was, and that nothing more need be done. The company sought to avoid payment because the sale of the property without a transfer or indorsement on the policy rendered it null and void. We held the company estopped from setting up such a defense. The present chief justice, delivering the opinion, said: "In view of the undisputed facts the defense is a most ungracious one—a defense which, under the circumstances, no reputable underwriter would think of interposing." And so we say here, this company demanded and received from this plaintiff, as the lawful holder of this policy, all the benefits and advantages which it was entitled to receive under it as a valid subsisting policy, up until the moment of the fire, and it would be a perversion of justice to permit it now to deny its liability and to allow it to escape the payment of its just dues under the contract. That is precisely what estoppel means.

The judgment is reversed, and judgment is now entered on the verdict in favor of the plaintiff and against the defendant for the sum of four hundred and fifty-three dollars and six cents as of the sixteenth day of October, 1894, with costs of suit.

INSURANCE—INTEREST OF HOLDER OF JUDGMENT LIEN.—A judgment is a general and not a specific lien, and the judgment creditor has no insurable interest in specific property of his debtor: *Grevemeyer v. Southern etc. Ins. Co.*, 62 Pa. St. 340; 1 Am. Rep. 420.

INSURANCE—INTEREST—RETAINING BY VENDOR.—A vendor retaining possession of the goods by agreement of the parties, and who has previous to the sale obtained policies of insurance thereon, which he held as collateral security for the balance of the purchase money, is the absolute owner so far as his creditors are concerned, and, as against the insurance companies, is the owner to the extent of the unpaid purchase money: *Norcross v. Insurance Companies*, 17 Pa. St. 429; 55 Am. Dec. 571. Compare *Little v. Phoenix Ins. Co.*, 123 Mass. 380; 25 Am. Rep. 96.

DIEHL v. RODGERS.

[100 PENNSYLVANIA STATE, 316.]

PARDONS—RESTORATION TO CIVIL RIGHTS.—A pardon generally removes the future consequences of the criminal act as completely as if it had never been committed, and restores the offender to all of his civil rights.

PARDONS—CONSTITUTIONAL LAW.—The power to pardon criminals given by the state constitution cannot be restricted or its operation limited by statute.

PARDONS—WITNESS—CREDIBILITY.—A person who has been convicted of crime and then fully pardoned is a competent witness, but his credibility is for the jury if either party requests that it be submitted.

PARDONS—WITNESS TO WILL.—A person convicted of crime, but fully pardoned therefor, is competent as a witness to a will.

WILLS—SIGNATURE BY ANOTHER.—If a testator in possession of all of his faculties of mind, but in the extremity of last illness, directs another to write out his testamentary directions and sign them for him, the will thus executed is valid under the statute, though the testator was physically able to sign his name, if the attaching of his signature by himself would have been at the risk of his life.

ISSUE to try the validity of the last will of R. C. Elliott. It was written and signed by one Lindsay under the direction of the testator while he was in the extremity of his last illness. Lindsay also signed the will as an attesting witness. Judgment for plaintiffs. Defendants appealed.

J. Fitzsimmons, J. McF. Carpenter, W. D. Moore, and J. M. Rourke, for the appellants.

J. S. & E. G. Ferguson, C. Burleigh, and J. R. Harbison, for the appellees.

319 **MITCHELL, J.** The main question is the competency of the witness Lindsay, who had been convicted of perjury, but pardoned by the governor prior to the events to which he testified.

The general rule is that a pardon does away with the future consequences of the criminal act, as completely as if it had never been committed. It is said in a case which will be noticed more fully hereafter (*Houghtaling v. Kelderhouse*, 1 Park. C. C. 241), that the doctrine of restoration of competency is modern, and that the authority of Coke is against it, but that later Holt and others established it. Passing by the obvious doubt whether any doctrine established by Lord Chief Justice Holt can fairly be called modern, we find that what Coke says in *Browne v. Crashaw*, 2 Bulst. 154, is, citing 11 Henry IV., folio 41 b, that one attainted

of felony but, pardoned, is not a competent witness, for *pœna mori potest, culpa perennis erit*. The authorities, however, are unanimously against this maxim. "If the king pardon these offenders they are thereby rendered competent witnesses, though their credit is to be still left to the jury, for the king's pardon takes away *pœnam et culpam in foro humano*": 2 Hale's Pleas of the Crown, 278. "It is now settled that a pardon removes not only the punishment, but all the legal disabilities consequent on the crime": 2 Russell on Crimes, 975; 7 Bacon's Abridgment, tit. Pardon, H., Bouvier's 12th ed., 416.

In England, however, a special exception is made in the case of perjury, where a distinction is taken between conviction on an indictment at common law and on an indictment under the statute of 5 Eliz., c. 9, which declares that no person so convicted shall thenceforth be received as a witness to be deposed and sworn in any court of record until such judgment be reversed: ³²⁰ 2 Russell on Crimes, 604. The distinction appears to have been first made by Lord Chief Justice Holt, who in *Rex v. Greepe*, 2 Salk. 514, says: "Where one is convict upon the statute it is part of the judgment to be disabled (to be a witness), but at common law it is only a consequential disability," and he accordingly held that the king's pardon removed the latter disability, but not the former. This ruling he repeated in *Rex v. Crosby*, 2 Salk. 689; *Rex v. Ford*, 2 Salk. 691; and *Anonymous*, 3 Salk. 155. It is now accepted as the settled law in England. "A pardon removes not only the punishment, but all the legal disabilities consequent on the crime wherever the disability is a consequence of the judgment; but where it is declared by an act of parliament to be part of the punishment, as in the case of perjury on the 5 Eliz., c. 9, the king's pardon will not make the witness competent": 2 Russell on Crimes, 975.

The American text-writers have generally followed this distinction without question, and apparently without much consideration. The ablest discussion to be found is in an article published in 1834 in 11 American Jurist, 356, signed "G," which perhaps may be safely conjectured to be by Professor Greenleaf, who was then writing his work on Evidence, in which he adopts the same view and quotes the article at considerable length. The writer, whether Greenleaf or another, follows the English distinction, but says, with accurate logic and great candor, "the soundness of the reason is not as

apparent as the justness of the exception. . . . If the culprit be sentenced to a fine and imprisonment and the pillory, and the whole offense is pardoned, by what authority shall any of these punishments be inflicted? And if instead of the pillory he is sentenced to incapacity as a witness, is the case altered? The pardon takes away the effect of the judgment, and nullifies all its consequences. Of what importance is it, then, whether the incapacity makes part of the judgment by statute, or follows it by the common law? It would be more satisfactory, therefore, if a reason for this exception could be found independent of the form in which the sentence may have been awarded." Instead, however, of pursuing the true course, and, where the reasons of a rule are altogether unsatisfactory, inquiring carefully into the soundness of the rule itself, *ratio legis anima legis*, he proceeds ingeniously to find a reason in the idea that while the disqualification ²²¹ to be a witness is a part of the punishment, and may operate severely against the convict, yet it may also be regarded as a rule of evidence which is within the legislative province to adopt or remove.

The American courts, however, have not accepted the rule or its reasons as unquestioningly as the text-writers. The diligence of counsel and my own investigation have only succeeded in finding two cases which have followed the English rule. In *Houghtaling v. Kelderhouse*, 1 Park. C. C. 241, the point was expressly raised and decided on the line of argument, and largely on the authority of the article in the American Jurist above quoted, but also on the words of the New York statute, that one convicted of perjury shall not be received as a witness unless the judgment be reversed, while in regard to other offenses the incompetency is declared unless pardoned, showing that the legislature had pardons in contemplation, a point that will be noticed hereafter in connection with our own statute. The other case is *Foreman v. Baldwin*, 24 Ill. 298, which simply rules the point on the English cases without discussion, saying that competency can only be restored by the legislature, and adding the surprising statement that "at every session there are applications of this character." In *Holridge v. Gillespie*, 2 Johns. Ch. 35, the point appears, but so briefly as a mere note at the end of the report, that no satisfactory evidence can be got from it of the views of the chancellor, Kent.

On the other hand in *Perkins v. Stevens*, 24 Pick. 277, it

was held that a general pardon would unquestionably restore competency destroyed by conviction of forgery, and while the court held the pardon in that case to be only limited and partial, yet they say that the statute providing that a pardon should not restore qualification for office "unless expressly so ordered by the terms of the pardon," plainly acknowledges "the power of the executive to remove even the statute disqualification." In *Wood v. Fitzgerald*, 3 Or. 568, it was held that the power of pardon given by the constitution, being without limitation, a full pardon would restore the right to vote to one who had been convicted of arson, though the constitution itself declared that the privileges of an elector should be forfeited by conviction of any crime punishable by imprisonment in the penitentiary.

*** These are the only decisions on the particular point, but in the long roll of cases, especially in our own state and in the supreme court of the United States, where the general subject has been most frequently and ably discussed from a great variety of points of view, there is nowhere any hint of such a restriction on the effect of a pardon. In *Hoffman v. Coster*, 2 Whart. 453, where the offense was passing counterfeit money, it is said on page 468: "One of the consequences resulting from the sentence was the disability of the party to be sworn as a witness; and when all the sentence is removed, together with the consequences of the sentence, except what had been suffered, this disability is removed. It cannot exist separate from the source from which it is derived." And the general effect of all the cases is thus stated in *Ex parte Garland*, 4 Wall. 333, 380. "A pardon reaches both the punishment prescribed for the offense and the guilt of the offender, and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. . . . It removes the penalties and disabilities, and restores him to all his civil rights."

In this position of the adjudicated cases, we are left free to follow what seem to us the sounder and more weighty reasons. The English distinction is not substantial. All penal consequences of crime, whether by common law or by statute, are equally results of the transgression of the law, and even the common-law consequences are historically presumed to be of statutory origin. There is no basis in sound reason for including one and excluding the other from the power to

pardon. The reason assigned by Coke was repudiated by Holt; the reason substituted by Holt is shown by the writer in the American Jurist, already quoted, to be equally unsatisfactory; and with deference to the latter's evident learning and ability, his reason is little better. Mr. Hargrave, in a very learned and elaborate discussion of this subject of competency, unfortunately not extending to the consideration of convictions on the statute, suggests a reason which is explanatory if not convincing: "Where parliament imposes a disability, to attribute to the king singly a power of removing it might at least approach to the assertion of a dispensing power in the crown," referring to ²²² the great case in the reign of James II. on the power of dispensing with the test act: 2 Hargrave's Juridical Arguments, 224. The king's prerogative of pardon is by the common law, but an act of parliament is supreme, and can change the common law in respect to prerogative as well as to other matters, and if it has done so, the prerogative is thereafter limited accordingly.

This reason cannot apply to the American states under written constitutions, which are superior to the legislative power. The constitution of the United States gives the president power to grant pardons except in cases of impeachment, and "the power thus conferred is unlimited with the exception stated, . . . it is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions": *Ex parte Garland*, 4 Wall. 333, 380. It is true there was a strong dissent in that case by nearly half the court, but it was based on the questions whether the qualifications of attorneys were matters for legislative or judicial control, and whether a disqualification imposed upon an attorney by statute after his admission was an *ex post facto* law. There was no difference of opinion as to the power of pardon or the effect of its exercise upon all parts of the penalty or punishment.

The constitution of Pennsylvania gives the governor the same unlimited power of pardon with the same single exception of cases of impeachment, though the exercise of the power is controlled by the condition precedent of a recommendation by certain officers conveniently known as the board of pardons. The constitution deals with the pardoning power not as a prerogative claimed by divine right, but as an ad-

junct to the administration of justice, recognized in all civilized governments as necessary by reason of the fallibility of human laws and human tribunals. The power so recognized is granted without distinction in regard to offenses or their consequences, and with no exception or limitation but the one noted, of impeachment. The fact that one is made shows that the subject of exceptions was considered, and therefore *expressio unius exclusio alterius est*. The power cannot now be further restricted or its operation limited by legislation.

§ 24 Nor in fact has any such restriction been attempted. There is no conflict between the statute and the executive act in this respect any more than in any other. The act of 1860 says the person convicted of perjury "shall be forever disqualified from being a witness in any matter in controversy," but it also says he shall be fined and imprisoned. Both are statutory consequences of the conviction, and the remission of one is no more a violation of the statute than the remission of the other. The statute does not say in either case, "unless he shall be pardoned," because the legislature in enacting the statute was not contemplating the exceptional case of a pardon, nor considering its effect on any part of the act. The word "forever" was introduced in the disqualification not with any reference to the effect of a pardon, but to show that it was not merely to run with the term of imprisonment, and to concur with the exception of the case of perjury in section 181 of the same act, providing that the endurance of the punishment shall have the effect of a pardon. The result of the two sections read together is that nothing shall remove the disqualification except a pardon, and this is the intent indicated by the commissioners who reported the criminal code, when they say that section 181 is new, and the object was previously attained through the pardon of the governor: Report, Purdon's Digest, ed. 1894, 563, note.

The same views apply to the act of May 23, 1887 (Public Laws, 158), relating to the competency of witnesses, etc. That is a careful revision and consolidation by a very competent hand of the whole law on the subject, and when in section 5 it provides that a person convicted of perjury shall not be a competent witness, although his sentence may have been fully complied with, etc., it merely continues the law of the two sections of the act of 1860 already discussed, with an express provision as to the effect of a reversal of the conviction, which would have been the legal result even without such

expression, and a humane exception in cases of injury to the convict's person or property. But this act did not, any more than the previous one, have any reference to the effect of a pardon.

Even if this were less clear than it is as a matter of statutory construction, the argument *ab inconvenienti* would be very strong. Suppose Lindsay was the only witness to a murder, must justice be baffled because of his disability? And yet how ³²⁵ is it to be removed if not by a pardon? It is said in *Foreman v. Baldwin*, 24 Ill. 298, cited above, that applications are made in that state to the legislature. Besides the practical difficulties in the delay and the running of the statute of limitations there would be other objections in this state. If such application be regarded as a pardon, the power is in the governor, not the legislature, and if it be regarded as a law, then it is special, and must run the gauntlet of the prohibitions against special laws relating to practice and evidence in judicial proceedings.

For each and all of these reasons we are of opinion that Lindsay was a competent witness, and the learned court below was right in admitting his testimony.

On the other points we have had some doubt as to the propriety of directing a verdict for the plaintiff, but are not convinced that it was error. The issue was one in which the judge sat as a chancellor, and both parties treated it as a question of law, and requested binding instructions. The exceptions and assignments of error as to this are not that the judge directed a verdict, but that he directed it for the plaintiff instead of the defendant. If Lindsay was a competent witness, and was believed, the requisites of the statute as to wills were complied with. His credibility was for the jury, if either party had asked that it be submitted, but neither did so.

We do not see any sound reason to question the result. The testator was in full possession of his faculties of mind, and had strength of body to sign the will, but he had the injunction of the physicians to keep quiet, enforced by the information that if he had another hemorrhage he might die in fifteen minutes. He ordered his will written, and when it was done ordered it signed. Undoubtedly he was physically able to sign it himself, but at a risk to his life that he was not bound, and could not be expected, to take. All the evidence shows an extremity of a last sickness of which the

testator was aware, and which he met with notable clearness and resolution. The case belongs to the class which the statute was meant to provide for.

Nor is there any reason to doubt that he meant his directions for a will, and regarded it as fully executed. He desired to know his condition, and after consultation his physicians informed him he might die in fifteen minutes, and if he had any worldly matters to settle he had better do so. He at once gave his ³³⁶ clerk the directions, had them written down, and when read to him said they were what he wanted, and ordered the paper signed. His acts do not admit of any other meaning than that he intended to make a will, and believed he had done so.

Judgment affirmed.

PARDONS.—The pardoning power is, by the constitution of Missouri, vested exclusively in the chief executive officer of the state, and cannot be exercised by the legislature: *State v. Sloss*, 25 Mo. 291; 69 Am. Dec. 467, and note. See the extended note to *State v. McIntire*, 59 Am. Dec. 573.

PARDONS—EFFECT OF.—A pardon by the president of the United States of one convicted of embezzlement in a federal court restores the offender to his right as a voter in the state: *Jones v. Board of Registrars*, 56 Miss. 766; 31 Am. Rep. 385. See, also, the extended notes to *State v. McIntire*, 59 Am. Dec. 578, and *Carr v. Smith*, 53 Am. Rep. 400.

PARDONED WITNESS—COMPETENCY.—A party who has been convicted of a felony, and afterward legally pardoned, is a competent witness: *Bennett v. State*, 24 Tex. App. 73; 5 Am. St. Rep. 875. A pardon, after expiation of the offense, is effectual to restore competency as a witness: *Hunnicutt v. State*, 18 Tex. Ct. App. 498; 51 Am. Rep. 330; compare *People v. Brown*, 43 Cal. 439; 13 Am. Rep. 148. See, also, the extended notes to *Carr v. Smith*, 53 Am. Rep. 400, and *State v. McIntire*, 59 Am. Dec. 580.

WILLS—SIGNATURE BY ANOTHER FOR TESTATOR.—This question is discussed in the notes to *Plate's Estate*, 33 Am. St. Rep. 808; *Chaffee v. Baptist Missionary Convention*, 40 Am. Dec. 231; *Rutherford v. Rutherford*, 43 Am. Dec. 645; *McGee v. Porter*, 55 Am. Dec. 131, and especially the extended note to *Guthrie v. Owen*, 36 Am. Dec. 318.

JONES v. ERIE AND WYOMING VALLEY R. R. Co.

[169 PENNSYLVANIA STATE, 333.]

RAILROADS—RIGHT OF WAY—RIGHT TO DEFINE BOUNDARY.—A railroad company is not bound to take the entire width of land for its right of way, but may define the limits thereof, so as to exclude whatever is not necessary to the construction and operation of its road. While the proper time to make this definition is when the appropriation is made, it may exercise the right afterward within a reasonable time.

RAILROADS—RIGHT OF WAY—RELEASE.—A railroad company may, within a reasonable time, withdraw from and release to the owner all or such part of its located right of way as is not necessary to the construction, maintenance, and operation of its road. When this is done the owner has no claim against the company for the land so released.

RAILROADS—RIGHT OF WAY.—THE PRESUMPTION that a railroad company takes, when it enters under the right of eminent domain, the full breadth of land allowed by law for its right of way, is applicable only when the entry is adverse and upon property subject to seizure or appropriation under general laws. It does not apply to an entry upon a public street, whether made under authority of the statute incorporating the company or by virtue of municipal consent.

RAILROADS—GRANT OF USE OF HIGHWAY.—In the absence of a clearly expressed intention to the contrary, a grant to a railroad company of the right to enter, cross, or pass along a public highway or street is a grant subject to the existing public right of use, and is to be exercised in such manner as shall interfere as little as possible with such use.

RAILROADS—GRANT OF PERMISSION TO CROSS STREET—OCCUPATION OF SPACE.—A grant of permission to a railroad company to cross the intersection of streets by an overhead structure, without designating the space to be occupied, authorizes the use of so much space as is necessary for the purpose of making the passage, and no more. The power of the company under the grant is exhausted by the building of the overhead structure that is authorized, and no more space can be occupied without a new application and a new grant from the city.

ACTION to recover damages for the location and construction of a railroad upon plaintiff's city lot. The defendant company had released all claim thereto either for right of way or otherwise. Judgment for defendant. Plaintiff appealed.

H. M. Hannah and S. B. Price, for the appellant.

E. Warren, E. M. Willard, and H. A. Knapp, for the appellee.

³³⁵ WILLIAMS, J. This proceeding was begun upon the theory that an entry by ³³⁶ a railroad company upon the streets of a city is made by virtue of the right of eminent domain alone, and secures to the railroad company a right of way in and upon the streets so entered sixty feet wide, precisely

as though the entry had been made upon the lands of a private owner. The plaintiff claimed that such a right of way would not only cover the street opposite his premises, but reach over a few feet upon his lot; and this taking was the injury complained of. The case was tried in the court below upon the same theory. It came into this court by appeal, and is reported in 144 Pa. St. 629. The question presented was over the power of the railroad company to define the boundaries of its right of way in such a manner as to take less than the maximum it was permitted to take under the general railroad laws. Confining our attention to the questions presented on the record, we held that the company had the power to define the limits of its right of way so as to exclude therefrom whatever was unnecessary to the construction and operation of its line. The proper time to do this, we said, was the time when the appropriation was made; but a failure to define its boundaries at that time did not take away the power to define them. This might be exercised afterward, within a reasonable time. The judgment was reversed and a new venire awarded. Upon the second trial the defendant company was permitted to file a paper defining the limits of its right of way as coincident with the street lines at the point where it was alleged the land of the plaintiff was invaded, and releasing any claim upon the plaintiff's land which it might have by reason of the location of its right of way. After the filing of this paper the learned judge of the court below directed a verdict in favor of the defendant. This appeal brings up the correctness of the ruling of the trial court upon this subject. The case was last tried upon the same theory as before. The right of the railroad company to the exclusive use of sixty feet for its roadway seems to have been assumed, and the contest was over the right of the company to renounce a part of that to which it might have laid claim, and leave its owner undisturbed. We concur in opinion upon this subject with the court below. If we assume the company had the right to locate its right of way in a public street in the same manner and of the same breadth as over the property of a private owner, we know of no rule of law ²²⁷ or public policy that compels a railroad company to take the utmost that it has the power to take. On the contrary, it seems very clear that such company may withdraw from, and release to the owner, all of the sixty feet not necessary for the construction, maintenance, and opera-

tion of its road; and that when this is done the owner has no claim against the company for the land so released.

But we are not willing to affirm this judgment and leave it to stand upon the ground on which it was placed by the court below. There is another and more important question, which, although not raised by any assignment of error, is plainly presented by this record, and is conclusive of this case. The defendant's bridge or overhead structure is located over the intersection of two of the streets of the city of Scranton. Permission to cross these streets was given by the municipal government. The rights of the railroad company upon and over them depend upon the terms of the municipal grant, and not upon the provisions of the general railroad laws. Unless the grant confers in express words or by necessary implication the right to overhang these streets for a breadth of sixty feet, the railroad company acquired under it only a right of passage over them, and this authorized the occupancy of no more space than was reasonably necessary for the purpose of passage. The structure that was erected under this grant shows just what was reasonably necessary for the passage of the defendant's road over these streets, and is a definition by the company of its needs, and a construction by it of the municipal grant.

The presumption arising under the general railroad laws that a railroad company takes, when it enters by virtue of the right of eminent domain, the full breadth of sixty feet for its right of way, is only applicable where the entry is adverse and upon property subject to seizure or appropriation under general laws. It does not apply to an entry upon a public street, whether made under the authority of the act of assembly incorporating the company, or by virtue of municipal consent. In either case, in the absence of express words, or their equivalent, giving an exclusive right to the street or to a defined part of it, the grant, whether legislative or municipal, will be construed most strongly against the grantee, and most favorably in aid of the previously existing public right of passage. The commonwealth is the ²²⁸ owner of the public highways. The municipality is charged with the duty of laying out and maintaining such highways as are necessary to accommodate the public within its territorial limits. A grant to a corporation of a privilege upon a highway, such as to enter, cross, or pass along it is, in the absence of a clearly expressed intention to the contrary, a grant sub-

ject to the existing public right of use, and is to be exercised in such manner as shall interfere as little as possible with those for whose benefit the way was originally laid out and opened. The situation in this case is greatly simplified by the application of these principles. The railroad company has no express grant from the legislature or from the city of Scranton to occupy the whole of the space over the intersection of Washington avenue and New street.

It has permission to cross the intersection by an overhead structure, and this authorizes the use of so much space as is necessary for the purpose of making the passage, and no more. How much was needed is shown by the structure that was erected under the permission. The power of the railroad company under the grant was exhausted by the building of the overhead crossing that was authorized; and nothing more can be done without a new application from the company, and a new grant by the city. The company has no right of way in the streets outside the terms of the grant by virtue of which it enters, and what was done by the engineers in marking an exterior line for the right of way at this point was done without any lawful authority, and had no effect upon the rights of the plaintiff. It was a trespass ignorantly or lawlessly committed on the lotowner for which an action of trespass was the appropriate remedy. We had this precise question before us in the recent case of *Pennsylvania etc. R. R. Co. v. Philadelphia etc. R. R. Co.*, 157 Pa. St. 42. A grant had been made to one railroad company to pass along certain streets in the city of Reading. This grant was found in the act of assembly incorporating the railroad, and had also been formally given by the city. Subsequently the city gave to another company the right to pass along the same streets. It was objected that the first grant was exclusive, as the right of way of sixty feet covered the entire surface of the streets. But we held that in all cases where the grant to a railroad company ³³⁹ is not in express words a grant of an exclusive use in a street, it must be construed as a grant of so much only as is reasonably necessary for the purpose of passage. Our brother Dean stated the rule very clearly in that case, and we can do no better than to repeat his words. He said: "There can be no constructive appropriation of the whole of a public street, under a right of passage, that will be effectual to bar the right of the public to the part not in actual use for

the purpose granted." This was merely a practical application to the facts of that case of the rule, formulated as early as *Commonwealth v. Erie etc. Ry. Co.*, 27 Pa. St. 389, 67 Am. Dec. 471, that "the powers of a corporation must be given in plain words or by necessary implication," and that powers not so given are withheld. It follows from what has been said that the defendant company has no right of way over the intersection of Washington avenue and New street except that which it actually occupies with its overhead structure.

It has no further right in the streets, and no right at all on the plaintiff's lands. The plaintiff, having suffered from no entry upon his premises, has no claim on the defendant in this form of proceeding, but must depend on his action to recover damages for the additional servitude which the overhanging of so much of the highway as would, upon its vacation, belong to him imposes. This subject was sufficiently discussed in *Jones v. Erie etc. Ry. Co.*, 151 Pa. St. 30, 31 Am. St. Rep. 722, and it is not necessarily involved in this case.

The judgment is affirmed.

RAILROADS IN STREETS—RIGHTS OF PUBLIC.—A railroad company cannot monopolize a street in derogation of the public or private use to which it has been applied: *Evans v. Chicago etc. Ry. Co.*, 86 Wis. 597; 39 Am. St. Rep. 908, and note; but it must construct the road in such place and manner as not to interfere with the use of the street by the public: *Pacific Ry. Co. v. Wade*, 91 Cal. 449; 25 Am. St. Rep. 201, and note. See, also, the extended note to *Western Paving etc. Co. v. Citizens' etc. R. R. Co.*, 25 Am. St. Rep. 475.

BIXLER v. KRESGE.

[169 PENNSYLVANIA STATE, 405.]

WAGES — PREFERENCE UNDER EXECUTION SALES — EVIDENCE. — While a strict compliance with the provisions of a statute giving a preference under execution sales for the wages of laborers engaged in cutting saw-logs is requisite to maintain claims for preferences, no particular grade of proof is required to establish the fact that the wages were earned in the manner specified in the statute different from the measure of proof necessary in ordinary cases.

PARTNERSHIP — HOLDING OUT — RIGHTS OF CREDITORS. — As between the partnership creditors and the individual creditors of an alleged partner of an alleged partnership having no actual existence in fact, although the parties thereto have held themselves out to the world as partners, there is no equity to support the claim of execution partnership creditors as against prior execution creditors of the individual partner who is the owner of the assets.

PARTNERSHIP—MINORITY OF ALLEGED PARTNER—HOLDING OUT—RIGHTS OF CREDITORS.—If a minor employed at a salary, and contributing no property to the business, is held out to the world as a partner, and, after becoming of age, repudiates his obligation on joint notes given by himself and his alleged partner, he has no equity which entitles the partnership creditors to a preference over the individual creditors of the partner who owns all of the assets of the alleged partnership.

APPEAL by Bixler & Correll from an order of the court of common pleas confirming an auditor's report distributing the proceeds of a sheriff's sale of the property of the alleged partnership of Kresge & Green.

C. B. Staples and J. H. Schull, for the appellants.

C. Gearhart and S. S. Shafer, for individual execution creditors.

D. S. Lee, for labor claimants.

412 **GREEN, J.** The act of June 12, 1879 (Public Laws, 176), gives a preference in the distribution of the proceeds of sheriff's sales of saw-logs, or of sales made by assignees for the benefit of creditors for all moneys due for cutting, skidding, hauling, and driving of saw-logs, limiting the amount to two hundred dollars to any one laborer. In this case there was a sale by the sheriff under executions of a stock of saw-logs and lumber *inter alia*, and two laborers gave notice to the sheriff of their claims in due form as required by the act. Charles Eschenbaugh claimed a lien for two hundred dollars, and Edwin Keiper claimed a lien for fifty dollars for work done within the statute. The notices to the sheriff were in due form, and sufficiently described the character and particulars of the claims. The auditor found as a fact that the work was done to the full amount of the claim in both cases, and this finding was affirmed by the learned court below. The appellants claim that the evidence upon which the auditor acted was not sufficiently definite to justify his findings.

While it is certain that a strict compliance with the provisions of the statute is requisite to maintain these claims for preferences, it does not seem that there is any particular grade of proof required different from what would be necessary in ordinary cases. Having read the report of the auditor and the testimony of the men, each one of whom swore positively that the amount claimed by each was certainly due for work actually done by each, we are satisfied of the truth of the fact, and see no occasion to revise the findings

of the auditor on this subject. Common laborers do not keep books of account for the work they do, setting down each day the amount of work they have done. Their employers keep such books in which the time made by the men is daily credited, and, if any mistake is made by the men in the claims they present, it is in the power of the employers to correct them at once. In this case the auditor reports that one of the employers was present and the other within easy reach, and neither was called to disprove either of the claims. ⁴¹⁴ We are satisfied with the report of the auditor upon this branch of the case.

On the question of the alleged partnership between Kresge and Oscar Green, the auditor finds, upon the testimony taken before him, and not contradicted, that, as between the men themselves, there never was any actual partnership. That, while it is true Green permitted himself to be held out to the world as a partner, and, therefore, if he were of age he would be liable as such, in point of fact he was merely a hired man working for fixed wages, and had no interest in the business or its profits or losses. He also finds that Green contributed no money or property to the concern, and that, while he signed some notes given for a stock of store goods, he paid nothing on the notes, and, being a minor who repudiated his obligations on account of his minority, he was subject to no legal liability upon the notes.

The auditor also finds that the tract of timber land in Tunkhannock township was purchased by Kresge, and the title taken in his own name, and that he also bought a portable sawmill in his own name, paid all the money that was paid, both for the sawmill and on the land, and conducted all the lumber operations in his own name.

These being the facts, and the present contest being a contention between individual and partnership creditors, the familiar doctrine becomes applicable that partnership creditors must work out their claims through the equity of the partner. If the partner has no equity, there is nothing to support the claims of the partnership creditors to the assets in question as against the creditors of the individual partner who is the real owner of the assets.

In *York County Bank's Appeal*, 32 Pa. St. 446, there was a written agreement between the partners establishing an actual and subsisting partnership, which was subsequently conducted publicly with all the usual indicia of a partnership.

But one of the partners had in fact not paid in any part of the capital, and the assets of the firm were in reality contributed by the other partner, whose property they were prior to the partnership. It was held that an individual execution creditor of the partner who owned the assets was entitled to preference in the distribution of the proceeds of the sale of the property of the firm over a partnership execution creditor.

Thompson J., ⁴¹⁵ delivering the opinion, said: "Between partners themselves the assets of the firm constitute a fund for the payment of their liabilities, and each member has an equity which he can enforce to accomplish this result, and, of consequence, a lien on the property to this extent. . . . When a creditor levies on the property of a firm, his execution fixes and attaches to this right to the same extent that it existed in the partners, and hence the preference over a separate execution creditor in the distribution. All this is predicable of a case of joint property only. But where there was no joint property, the rule has nothing to operate on. The mere name is not enough in such a case—there must be an equity. If that equity never existed, a creditor's execution could not attach to any right amounting to a lien, to have the assets appropriated to a partnership debt. That Moore has no interest in the firm property is found by the auditor. . . . This being so the property levied on was individual property in fact though seized in the firm's name. The appellant cannot work out his equity through the partners, for they as such did not exist, *inter se*, and the individual owner could not give him this right over a prior execution against him individually." All this, and more, was said of a case in which there was an actual partnership fully agreed upon and really carried on for a number of months. But in the case at bar there never was a partnership as between the alleged partners, and this the auditor finds as a fact upon undisputed testimony. In addition to that Green never furnished anything to the firm, and therefore acquired no title to the firm property. He either signed or indorsed some notes with his individual name, but he paid nothing on them. On the contrary he was paid a monthly compensation for his services as clerk or assistant. It is too plain for argument that as between Green and Kresge there never was, and never was agreed to be, any partnership relation. In point of fact Green never contributed a dollar of money or any article of

property to the partnership, and he never agreed or intended to do anything of that kind, nor could Kresge expect him to do so. The notes on which his name appeared not only were never paid by him in whole or in part, but they did not appear on their face to be firm notes, and his liability could never be more than an individual liability. But such as they were, he was a minor when he gave them, he ⁴¹⁶ had a legal right to repudiate them, and he actually did repudiate them, as soon as he attained his majority. We find it impossible to discover in the testimony any proof of the existence of any real equity in Green as a partner, and therefore there is nothing upon which to build up a right on the part of any firm creditor to seize upon any firm property, as against an individual execution creditor of Kresge, who had acquired a prior lien upon the goods.

York County Bank's Appeal, 32 Pa. St. 446, was repeated and reaffirmed in *Scull's Appeal*, 115 Pa. St. 141, where the facts were much stronger in favor of the firm creditors than they are in the present case. A careful reading of the whole record in the present case, including the arguments of the learned counsel on both sides, convinces us of the entire correctness of the conclusions reached by the auditor and the learned court below.

The decree of the court below is affirmed and appeal dismissed at the cost of the appellants.

PARTNERSHIP—EQUITY OF FIRM CREDITORS IN FIRM ASSETS.—The creditors of a firm have no equity in the partnership property; therefore with the consent of the partners it may be applied to the payment of their debts: *Smith v. Smith*, 87 Iowa, 93; 43 Am. St. Rep. 359, and extended note fully discussing the rights of partnership creditors. See, also, the extended notes to *Davies v. Atkinson*, 7 Am. St. Rep. 377, and *Kirby v. Schoonmaker*, 49 Am. Dec. 163.

PARTNERSHIP—HOLDING ONE OUT AS PARTNER—RIGHTS OF CREDITORS. If parties represent themselves as partners, persons who deal with them as such are entitled to have the property used in the business applied to the payment of their debts in preference to the individual debts of those representing themselves as partners: *Van Kleeck v. Hammell*, 87 Mich. 599; 24 Am. St. Rep. 182. This question is fully discussed in the extended note to *Hahlo v. Mayer*, 22 Am. St. Rep. 757, and the note to *Fletcher v. Pullen*, 14 Am. St. Rep. 361.

PORTNER v. KIRSCHNER.

[160 PENNSYLVANIA STATE, 472.]

EMBEZZLEMENT—OBLIGATION TO RETURN MONEY TAKEN—SECURITY.—An embezzler is under a legal and moral obligation to repay the person whose money he has wrongfully taken. It is neither unlawful nor against public policy for him to voluntarily give a bond with sureties as security for its return.

SURETYSHIP—EMBEZZLEMENT—COMPOUNDING FELONY.—The sureties on a bond given by their principal to secure the return of money embezzled by him cannot avoid the obligations of the bond on the ground that it was given for an illegal consideration, without proof that criminal proceedings have been stifled thereby, or that fraud or coercion has been practiced upon them.

SURETYSHIP—EMBEZZLEMENT.—The sureties on a bond given by an embezzler for the return of the money taken can avoid it only by showing that it was given for an unlawful purpose, or that its execution was obtained by unlawful means.

SURETYSHIP — EMBEZZLEMENT — COMPOUNDING FELONY. — In an action against the sureties on a bond given by an embezzler to secure the return of the money taken, an affidavit of defense alleging that the debt secured was money embezzled, that the creditor accepted the bond in lieu thereof, and that such acceptance worked the release of the debtor from all liability to prosecution for the crime of embezzlement, is insufficient. It should also allege the employment of criminal proceedings or of threats to resort to them, as a means of coercion to compel the execution of the bond.

ASSUMPSIT upon a bond. Appeal from an order of court discharging a rule for judgment for want of a sufficient affidavit of defense.

W. Gorman and J. H. Campbell, for the appellants.

F. J. Lambert, for the appellees.

474 WILLIAMS, J. The facts of this case are clearly presented by the statement 475 and the affidavit of defense. It appears that Kirschner was at one time financial secretary of Local Union No. 100 of the Cigar Makers' International Union. He failed to pay over all the money that came into his hands as such officer, and on the nineteenth day of February, 1891, gave the bond in suit for the amount of his indebtedness. The other defendants signed the bond as sureties for him. The condition of the bond was for the payment by Kirschner of the amount of his indebtedness to Local Union No. 100 within three years and four months from its date, at the rate of twenty-five dollars per month.

On the following day two hundred dollars were paid upon the bond. This action is brought for the recovery of the re-

mainder. The affidavit of defense set up three reasons for resisting a recovery by the sureties: 1. That the payment of two hundred dollars upon the bond the day after it was given and before it became due worked such a change in the terms of the obligation as ought in equity to relieve the sureties; 2. That the plaintiffs who have sued as trustees for Local Union No. 100 are not now in office, although they were when the bond was taken; 3. That the bond was given in settlement for an embezzlement by Kirschner, and is therefore invalid. As the first and second of these are obviously without merit, we assume that the learned judge of the court below rested his ruling upon the third, and regarded it as setting forth a good and sufficient ground for a defense by the sureties of Kirschner. Our question therefore is over the sufficiency of the affidavit of defense in so far as this averment is concerned. The averment is that the bond was "invalid in law in that it was given by Kirschner and accepted by the obligors for the purpose of compounding and settling a charge of embezzlement . . . and after the execution thereof the said obligors in consideration thereof released the said Kirschner from all liability to prosecution for said crime of embezzlement." There is here no allegation that a criminal prosecution was ever begun or threatened, or that the execution of the bond was asked as the price of releasing Kirschner from liability, criminally, for his embezzlement. What is set out is that the bond was given for the purpose of "settling a charge of embezzlement," and that after its execution and delivery "the said obligees in consideration thereof released the said Kirschner from all liability ⁴⁷⁶ to prosecution for said crime of embezzlement." Is this a statement of a fact, or of the inference of the affiant from the acceptance by the committee of Local Union No. 100 of the bond in lieu of the money due them? We are unable to tell from the examination of the affidavit what is meant by this averment. An embezzler is under an obligation, legal and moral, to repay the person whose money he has wrongfully appropriated to his own use, that is, to say the least, no less than that which rests on an ordinary debtor. It is clearly his duty to pay back the money he has embezzled. If he cannot repay it at once it is his duty to do so as speedily as he can, and to secure such repayment in the best way he is able. It is not unlawful therefore for an embezzler who finds himself unable to return the money he has improperly used, at once, to give security

for its return at such future day as the creditor is willing to accept. The debt is a good and valid consideration for the security given to the creditor. It is not against public policy for a thief to return the property stolen, or the value thereof, to the owner; but it is part of the sentence pronounced upon him by law upon his conviction. It is not against public policy for an embezzler to return the money he has embezzled to the owner thereof. On the contrary, the law provides the injured party with civil remedies for the recovery of his money, and a criminal remedy for the punishment of the wrong done him. Public policy is contravened only when the injured party attempts to wrest the criminal proceedings, open to him, from their proper purpose, and make use of them as a means of coercing the defendant into the payment of money. When he prosecutes in the name of the commonwealth he must do so in good faith to the public, and he must not pervert the machinery of the criminal courts from its purpose, or use it as an engine of oppression for the purpose of extorting money from an impecunious or a reluctant debtor. It is not enough, therefore, that the affidavit alleges that the debt secured by the bond was for money embezzled, nor that the creditor accepted the bond in lieu of the money embezzled, nor that the acceptance of the bond worked the release of the debtor "from all liability to prosecution for said crime of embezzlement." It must go further, and allege the employment of criminal proceedings, or the threat to resort to them, as a means of coercion ⁴⁷⁷ to compel the execution of the bond. In other words, it must set out that the bond was executed under duress, and not for the purpose of settling or securing an honest debt due to an injured creditor. A threat to proceed criminally against the embezzler may not be enough to invalidate a security taken for the money due: *Fulton v. Hood*, 34 Pa. St. 365; 75 Am. Dec. 664.

The bond was signed by the defendants. They undertake to show a reason why they are not bound by their own act in executing it. They must show either that it was given for an unlawful purpose, or that its execution was obtained by unlawful means. The return of the money embezzled by Kirschner was not an unlawful purpose. The agreement by his creditors to accept it in small monthly payments running over several years was not unlawful. The acceptance of the bond as a full equivalent for money that had been embezzled was not unlawful. It is not alleged that any criminal

proceedings were instituted against Kirschner, or that any fraud or coercion was practiced upon the defendants. The public had no interest in the transaction which public policy could be invoked to protect, and the defendants were not imposed upon. They have therefore no claim to relief: *Bredin's Appeal*, 92 Pa. St. 241; 37 Am. Rep. 677. *Riddle v. Hall*, 99 Pa. St. 116, is urged on our attention as a case in point, but it does not so impress us. In that case a prosecution was pending against the son of Mrs. Riddle. Another was threatened against her husband. She was made to believe that if she gave the mortgage it would end both the pending and the threatened prosecutions. She gave it for that purpose. The bank took it with full knowledge. It discontinued the prosecution against the son, but soon after began a new one against both the husband and the son, and pushed it to conviction and sentence. She then defended against the payment of her mortgage on the ground that it had been obtained from her by representations intended to mislead and deceive her. She asserted that she was induced to execute and deliver it to save her husband and her son from prosecution criminally by the bank, and that after obtaining it the bank did just what its officers had induced her to believe it would not do if the mortgage was given. In this case no prosecution was ever instituted or threatened so far as the affidavit informs us. There were no proceedings to discontinue at that time, and none have been entered upon at any time since. No fraud or ⁴⁷⁸ misrepresentation is alleged, no compounding of any criminal prosecution is set up. The affidavit of defense was therefore insufficient and the action of the court below erroneous.

It is now ordered that the order appealed from be reversed and the record remitted to the court below, with directions to enter judgment against the defendant for such sum as to right and justice may belong, unless other legal or equitable cause be shown to the said court why such judgment should not be so entered.

EMBEZZLEMENT—COMPOUNDING FELONY—RETURN OF MONEY TAKEN.—
A master has a right to receive money from his servant or the wife of the latter, or from a third person, in payment for money embezzled by such servant, so long as the master does not promise, either expressly or by implication, not to prosecute the crime: *Miller v. Minor Lumber Co.*, 98 Mich. 163; 39 Am. St. Rep. 524, and note; *Cass County Bank v. Bricker*, 34 Neb. 516; 33 Am. St. Rep. 649, and note.

SURETYSHIP—COMPOUNDING FELONY.—Where a postoffice clerk, who had embezzled funds for which the postmaster was liable to the government, gave the postmaster a note with surety to secure him, he agreeing not to prosecute criminally for the embezzlement, it was held that the note was valid and the surety was liable: *Bibb v. Hitchcock*, 49 Ala. 468; 20 Am. Rep. 288, and note. The owner of goods wrongfully taken may receive compensation for the injury sustained, and may take a note signed with sureties therefor, and, in such case, unless there is an agreement not to prosecute or to suppress evidence of the crime, the defense of compounding a felony is not available against the note: *Cass County Bank v. Bricker*, 34 Neb. 516; 33 Am. St. Rep. 649. Security executed by a mother to protect her son from exposure and prosecution for embezzlement is invalid: *Foley v. Greene*, 14 R. I. 618; 51 Am. Rep. 419, and note; *Pied v. McKee*, 42 Iowa, 698; 20 Am. Rep. 631.

GETTYSBURG NATIONAL BANK v. CHISOLM.

[160 PENNSYLVANIA STATE, 564.]

NEGOTIABLE INSTRUMENTS—ALTERATION.—A note altered after execution by the apparent interlineation on its face of the words “with interest at six per cent” without the knowledge or consent of the maker is void, and an innocent purchaser for value can not recover the principal on the note as originally given by waiving any claim for interest.

ASSUMPSIT on the following note:

\$ 66.66 4 int. 70.66	Huntingdon, Pa., Mar. 25 1892
One year after date, I promise to	
Pay to the order of E. Bennett & Son at the	
First National Bank of Huntingdon, Pa.	
Sixty Six 66	Dollars
with interest at 6 per cent.	
without defalcation for value received.	
No. 16597	Due 3/98 H. C. CHISOLM

Judgment for plaintiff. Defendant appealed.

G. B. Orlady and H. H. Waite, for the appellant.

J. M. Bailey, for the appellee.

568 GREEN, J. It was an entirely undisputed fact in this case that the defendant's obligation in suit was altered, after it left him, and without his knowledge or consent. The alteration was made by a visible interlineation of the words

“with interest at six per cent.” That this alteration was not merely a fraud, but was also a criminal forgery of the instrument, is manifest upon the present state of the testimony. From the evidence given on the trial it appears that the alteration was made by the payees’ agent, and as the payees are chargeable with knowledge of the state of the instrument when it came to them, and also ⁵⁶⁹ when it was used by them in bank, they must accept responsibility for the alteration. So far as the legal effect of the alteration is concerned it is quite as important as if the note had been changed from sixty-six dollars to sixty-six hundred dollars. It is as much an alteration of the defendant’s contract in the one case as it would have been in the other, and the alteration must be regarded as being made by the payees. There is no room for an inference, and there is no proof in the cause, that the alteration was made innocently. It was certainly done for the purpose of increasing the liability of the defendant, and that alone stamps the transaction with fraud and with guilt. It is not disputed, indeed is conceded, that there could be no recovery on this instrument by the payees. It is urged, however, that the plaintiff, being an innocent holder for value, can recover notwithstanding the alteration, because he proposes to recover only the amount of the note as it was before the alteration. If such were the law, forgeries by alteration would be protected by the law. The fraudulent payee would run no risk of loss, because he would only have to transfer the note to an indorsee, who might recover the original amount of the note by simply proving that he was innocent of the fraud. But the law is not so charitable to this class of persons. So far as the indorsee is concerned in this case the note was not innocently acquired, because the interlineation was apparent on the face of the note, and was notice sufficient to put the plaintiff upon inquiry. The words “with interest at six per cent” do not occupy the whole line, but only a little more than half of it. These words look as if they were interlined, and in point of fact they were so.

In *Simpson v. Stackhouse*, 9 Pa. St. 186, 49 Am. Dec. 554, the added words were: “Payable at the Bank of Pittsburg,” but they were written at the end of the instrument, and the only circumstance upon which we held the plaintiff, the indorsee, responsible for the alteration was that the added words were in a different handwriting from the rest of the instrument, which was written by the defendant. Gibson,

C. J., said in the opinion: "The principle of the English cases is that an alteration so far apparent on the face of a bill or note as to raise a suspicion of its purity makes it incumbent on the plaintiff to prove that it is still available, and that it is not incumbent on the defendant to disprove it. . . . He who takes a blemished bill or note takes it with its imperfections on its head. He becomes sponsor for them, and though he may act honestly he acts negligently. . . . Mr. Chitty says in his Treatise on Bills, page 213, that a drawee ought not to accept a bill which has the least appearance of alteration, and it was not disputed at the trial that this note had that appearance or that the alteration was in a material part of it."

In *Kennedy v. Lancaster County Bank*, 18 Pa. St. 347, the action was brought by a bank, as holder, against the indorser, and it appeared that the date of the note had been altered from the 12th to the 13th of August. It was held that this alteration vitiated the note, although the bank officers purged themselves of all knowledge of the alteration. We decided that it was not sufficient for the holder to show that the date was not altered after he received it; in order to recover, it was necessary for him to show that the alteration existed when the defendant indorsed it, or that he assented to the alteration.

In the case of *Paine v. Edsell*, 19 Pa. St. 178, the action was brought by an innocent holder against the indorser, and it was alleged the date had been altered. The court below admitted the note in evidence saying: "But this note presents no such marks of alteration as make it necessary for the plaintiff to offer explanatory proofs. The date is disfigured by a blot, on which one of the figures is made, and very few written instruments are free from similar defects." But Black, C. J., said: "In *Simpson v. Stackhouse*, 9 Pa. St. 186, 49 Am. Dec. 554, it is decided on principles perfectly satisfactory that an apparent alteration in a material part of a negotiable instrument avoids it, unless it be proved that such alteration was lawfully made, and the burden of proving how it was made is on the holder. That the note in question was altered in its date can be seen at a glance, and, inasmuch as no evidence was given to explain it, the jury should have been instructed that the plaintiff was not entitled to recover."

This note, also, was in the hands of an indorsee of the payee, but that circumstance did not help his right of recovery.

ery. As it was not proved, and probably is not possible to prove, in the case at bar, that the alteration was lawfully made, it is difficult to see how, under the foregoing decisions, there can be any recovery.

⁵⁷¹ In *Neff v. Horner*, 63 Pa. St. 327, 8 Am. Rep. 555, the instrument upon which suit was brought was a promissory note in form, but the parties signed it with seals, making it substantially a bond. The parties signing it were a principal debtor and four sureties. When the paper was brought to the payee he declined to receive it unless the words "interest semi-annually" were added. The principal debtor then added at the end of the instrument the words "interest to be paid semi-annually," without obtaining the consent of the sureties. We held the instrument avoided by the alteration. Agnew, J., said: "It seems to be settled that a voluntary alteration of a bond, note, or other instrument under seal, in a material part, to the prejudice of the obligor or maker, avoids it, unless done with the assent of the parties to be affected by it [citing numerous authorities]. . . . In respect to bills, notes, or other commercial paper, the rule is even more stringent, the law casting on the holder the burden of disproving any apparent material alteration on the face of the paper." We held, also, that there could be no recovery of the principal without the interest. The court below had held that this could be done, but in this respect we reversed the judgment, saying: "The note was, therefore, avoided as to the sureties, and the court erred in holding that the plaintiff could recover the principal from all the parties, disregarding his claim for the interest. It is argued that a recovery of the principal sum does no harm, for to that extent the sureties bound themselves. But the conclusive answer is that stated by Mr. Greenleaf, *supra*, section 565. The ground of the rule is public policy to insure the protection of the instrument from fraud and substitution. The writing goes into the hands of the party who claims its benefit, and the purpose is to take away the motive for alteration, by forfeiting the instrument on discovery of the fraud. When the sureties signed it they had a right to have it delivered unaltered to the plaintiff. He was bound to know that the alteration was rightfully done, and that the penalty of his negligence or his wrongful act was the loss of the security."

A similar attempt to recover the principal without the interest was made, on the trial, in *Fulmer v. Seits*, 68 Pa. St.

237, 8 Am. Rep. 172, but we declined to permit it. The alteration there, as here, was of a promissory note to which the words "interest payable semi-annually" ⁵⁷² were added by the principal debtor at the end of the note. The alteration was made by the payee in the presence and with the consent of the principal debtor. The suit was brought to recover the whole amount of principal and interest, and the note was signed directly by all the parties, three of whom were sureties. On the trial the plaintiff made application to strike out the added words and recover only the principal sum. This was refused by the court below and sustained by this court. Agnew, J., said: "Failing to show his right to recover against them, because of his failure to prove their assent to the alteration, he fell directly within the rule of policy which forbids the recovery of anything upon the altered instrument. . . . One who makes a voluntary and unauthorized alteration of a written contract, and insists upon it by going to trial to recover upon the altered state of the instrument, has no *locus penitentiae*, which, on his failure to establish his right to recover, will enable him to undo the wrong at the trial, and to stand as one who has made an innocent mistake, and never has insisted upon his right to enforce it."

In the present case the alteration was most probably made by an agent of the payee, and it was entirely without the knowledge and consent of the defendant, who was the maker of the note. Of course the payee could not recover on the note for any amount, because it was an altered instrument, and is avoided altogether by public policy. Certainly he could not restore life to it by passing it over to an indorsee.

In *Hartley v. Corboy*, 150 Pa. St. 23, we reviewed the authorities upon this subject, and it is not necessary to do so again. There, also, an attempt was made to recover on the original state of the note before the alteration was made, and the court allowed it to be done, but we reversed the judgment without a venire, holding there could be no recovery of anything. We said: "It matters not the least whether the alteration was made innocently, or in the belief that such a change could be lawfully made without the consent of the indorser. It is against public policy to permit such things to be done."

In *Hill v. Cooley*, 46 Pa. St. 259, the action was by an indorsee of a note against the maker, and the alteration consisted in the addition of the words "payable at N. Holmes & Son,"

introduced between the end of the note and the signature of the ⁵⁷⁸ maker. The court below held that the alteration was apparent, and charged the indorsee with the duty of explaining it by proof that the maker consented to it. In the absence of such proof it was refused admission in evidence, and this court sustained the judgment. Woodward, J., said: "The words 'payable at N. Holmes & Son' were alleged to have been added to the note after it was signed, and appearances favored the allegation. They were admitted to be in the handwriting of one of the payees who wrote the body of the note, and they certainly look as if added after the signature. . . . All the authorities cited in argument bear against the plaintiff in error, while *Simpson v. Stackhouse*, 9 Pa. St. 186, 49 Am. Dec. 554, is conclusive in favor of the ruling below. According to the doctrine of that case the indorsee who sues this note took it with its imperfections on its head, and was bound to come into court prepared to explain them."

The case of *Kountz v. Kennedy*, 63 Pa. St. 187, 8 Am. Rep. 541, has no application, as was well shown by Agnew J., in *Fulmer v. Seitz*, 68 Pa. St. 237; 8 Am. Rep. 172. In this case the action was originally brought before a magistrate, and the whole amount of principal and interest was claimed and recovered. The transcript of the justice shows this, and by rule of court the transcript takes the place of the declaration, and therefore supports the allegation that the plaintiff sought to recover interest on the trial, until it asked leave to file an amended statement, claiming only the principal, without the interest. This was allowed by the court below, and in this, as we think, there was error. There is no merit in the objection that the pleas were not verified by affidavit. The note in question being before the court, and being shown by undisputed testimony to have been altered without the defendant's consent, and there being no evidence to explain the alteration, which was in a material part, or to show that it was lawfully made, was void as against the defendant, and no recovery could be had upon it.

Judgment reversed.

MITCHELL, J. The alteration being in the same hand and ink as the rest of the note, the question of when it was made should go to the jury. I would therefore award a *venire de novo*.

NEGOTIABLE INSTRUMENT—ALTERATION AFTER EXECUTION—EFFECT ON. An alteration in a promissory note by filling up a blank for interest after it was executed, and contrary to the agreement of the parties, renders it void as between the maker and the party who made the alteration. Such alteration may be shown as against an innocent purchaser for value before maturity: *Conger v. Crabtree*, 88 Iowa, 536; 45 Am. St. Rep. 249, and note. The material alteration of a promissory note by any of the parties thereto discharges from liability thereon all other parties not consenting to or authorizing such alteration: *Montgomery v. Crosshwaite*, 90 Ala. 553; 24 Am. St. Rep. 832, and note; *Fordyce v. Kosminski*, 49 Ark. 40; 4 Am. St. Rep. 18, and note; *Burrows v. Klunk*, 70 Md. 451; 14 Am. St. Rep. 371, and note.

REYNOLDS v. REYNOLDS LUMBER COMPANY.

[169 PENNSYLVANIA STATE, 626.]

EXECUTION SALES.—PROPERTY OF PURELY PRIVATE CORPORATIONS, though useful and necessary to the conduct of their business, is subject to sale under execution in the same manner as the property of an individual, and the execution plaintiff is entitled to the proceeds of such sale to the exclusion of the general creditors of the corporation.

EXECUTIONS.—PROPERTY OF PUBLIC CORPORATIONS reasonably necessary and essential to the exercise of their franchises is exempt from levy and sale by an execution creditor. Such creditor must resort to sequestration of the earnings of the corporation.

D. I. Ball, and C. C. Thompson, for the appellant.

W. W. Wilbur, S. T. Neill, W. B. Chapman, P. D. Clark, and L. G. Ball, for the appellees.

628 FELL, J. This appeal is by James Roy, sheriff of Warren county, from an order of the court of common pleas, directing him to pay into court certain moneys, the proceeds of an execution against the Reynolds Lumber Company. Nearly a year before the order was made, the sheriff had paid the money in question to the Warren Savings Bank, the assignee of the plaintiff in the execution. This payment was made after the return day of the writ of execution, at a time when no rule was pending, and before the claim of the appellees had matured. Rules to show cause why the money should not be paid into court granted on the application of other creditors were discharged, and it appears from the record that the payment was made by the sheriff, in the due course of a regular and orderly proceeding, without notice of the appellee's claim. The payment was proper and 629 relieved the sheriff of all responsibility unless the fund belonged to all the creditors, in which case it would have

been his duty to pay it into court for a pro rata distribution among them. The learned judge of the common pleas, specially presiding, reached the conclusion that the plaintiff in the execution secured no preference by the levy under his writ, and that all the creditors of the defendant were entitled to participate in the distribution, and it is upon this view of the law that the order is based.

It would doubtless be more equitable if the property of insolvent debtors should be distributed among all the creditors in proportion to their claims, but it has not been the policy of the law in this state to forbid a preference, nor to prevent the vigilant creditor from acquiring a lien by levy upon personal property. There seems to be no ground for a distinction in respect to the distribution of the proceeds of a sale by execution of the property of an individual and that of a corporation which may be sold separate from its franchises. The special writ of fieri facias provided by the act of April 7, 1870, is by its terms in addition to and in lieu of the proceeding by sequestration given by the act of June 16, 1836. In the appeal of *Philadelphia etc. R. R. Co.*, 70 Pa. St. 355, it was held that the remedies by sequestration and execution could not coexist, and that the later act took the place of the former to the extent of superseding the writ of sequestration. The rule as to distribution, however, remains undisturbed: *Bayard's Appeal*, 72 Pa. St. 453. And the special writ given by the act of 1870 under which the property, rights, and franchises of a corporation can be sold, can issue only after the personal property subject to the ordinary process of execution has been exhausted, and there has been a return of the writ. In the opinion in *Guest v. Merion Water Co.*, 142 Pa. St. 610, it is said by McCollum, J.: "The fieri facias allowed by this act (1870) is not a substitute for the ordinary fieri facias under the seventy-second section of the act of June 16, 1836, but is in lieu of sequestration under the seventy-third section. The process and procedure provided by the seventy-second section remain, and the process provided by the seventy-third section is superseded by the special fieri facias given by the act of 1870. The condition precedent to sequestration was an ordinary fieri facias ⁶²⁰ returned unsatisfied in whole or in part, and this must precede the writ which takes its place. By this precedent return on the ordinary fieri facias the insolvency of the corporation is discovered and the necessity of recourse

to a sale for the benefit of its creditors of its franchises and property essential to its operation is demonstrated."

There has been no conflict in the decisions upon this subject. *Hopkins' and Johnson's Appeal*, 90 Pa. St. 69, while apparently not in line with the cases, decides no question touching the distribution by law of the proceeds of the sale of corporate property. It arose under irregular and anomalous proceedings before a master who by agreement of the parties in interest was to determine the validity of certain judgments and award distribution as if the fund was held in trust for creditors. The judgments in question were found to be invalid, and distribution was made in accordance with the agreement, preference being given to creditors having valid liens. No question affecting the rights of creditors in distribution outside of the agreement was decided or considered, and the statement in the opinion that the sale was for the benefit of all the creditors was evidently based upon the supposition that the franchises had been sold under the act of 1870, and it is misleading because misapplied. In the per curiam opinion in *First Nat. Bank v. New York etc. Coke Co.*, 137 Pa. St. 601, Chief Justice Paxson was speaking of the effect of a sale under the special writ which had been issued in that case.

When the operations of a corporation are matters of direct public interest and concern, its property reasonably essential to the exercise of its franchises is stamped with the character of a public trust. It cannot be aliened by the corporation, nor sold by its creditors piecemeal so as to stop its operations and defeat the object of its charter. Before the act of 1870, such property could not be taken in execution in this state. The sequestration proceedings of the act of 1836 were suggested by Chief Justice Tilghman in the opinion in *Ammant v. New Alexandria etc. Turnpike Co.*, 13 Serg. & R. 210, 15 Am. Dec. 593, and after the passage of that act it was held in *Susquehanna Canal Co. v. Bonham*, 9 Watts & S. 27, 42 Am. Dec. 315, that the franchises and corporate rights of a canal company, and its property necessary to their exercise, were incapable of being transferred or granted away ⁶³¹ by any act of the company itself or by any adverse process against it, and that sequestration was the only remedy consistent with the preservation of the public interests. The act of 1870 provides a remedy by which the rights of creditors can be enforced without prejudice to the public interest

by the sale together of the franchises and the property necessary to their exercise.

When, however, the business of a corporation is purely private, and the public has no direct interest in it, its property may be sold without regard to the effect upon its operations. Judge Thompson, in the opinion in *Foster v. Fowler*, 60 Pa. St. 27, referring to the distinction between corporations which are agencies of the public and directly affect it and those which affect it only indirectly by adding to its prosperity, said: "Of the former are corporations for the building of bridges, turnpike roads, canals, and the like. The public is directly interested in the results to be produced by such corporations, in the facilities afforded to travel and the movements of trade and commerce. It is well settled that this use is not to be disturbed by the seizure of any part of their property essential to their active operations by creditors. They must recover their debts by sequestering their earnings, allowing them to progress with their undertaking to accommodate the public. This direct benefit to and accommodation of the public very clearly distinguish this class of corporations from the second class, viz.: private corporations, or those in which the public is but indirectly interested, such as mining and manufacturing or coal and iron companies, etc., or libraries, literary societies, schools, and the like. Whether they progress or cease the public is not directly affected, and hence liens are enforceable against them without, as a general thing, any regard to the effect upon their operations."

In the case above referred to it was held that a mechanic's lien could not be enforced against a water company, and this ruling was followed in *Guest v. Merion Water Co.*, 142 Pa. St. 610, while in *Girard Point Storage Co. v. Southwark Foundry Co.*, 105 Pa. St. 248, and in *McLeod v. Central Normal School* 152 Pa. St. 575, it was decided that mechanics' liens could be maintained, as the defendants were not quasi-public corporations.

The reason for the exemption of any of the property of a corporation from levy and sale by an execution creditor is that the interests of the public are involved. The exemption does not extend in any case to property not reasonably essential to the exercise of the franchises. If the charter is for a purpose in which the public is directly interested, and the grant is for a use which the public may assert and enforce as a right, the property of a corporation necessary for its oper-

ation in carrying out its public purpose cannot be sold except with its franchises under the special writ provided by the act of 1870. If, however, the corporation is purely private and the public has no direct interest in its operations or rights concerning them, its property, although useful and necessary to the conduct of its business, may be sold under an ordinary writ of fieri facias in the same manner as the property of an individual.

The Reynolds Lumber Company, the defendant in the execution, is a private corporation, chartered in West Virginia and doing business in New York and Pennsylvania. Its charter confers upon it the bare right of corporate existence. It performed no public functions whatever. No public trust was committed to it or imposed upon its property, and the public had no interest in its operations and no rights connected therewith. Its business was of a private character and such as might have been and usually is carried on by individuals. Its property, which was sold under the ordinary writ of fieri facias, consisted of timber, lumber, merchandise, horses, and personal goods and chattels. A part of this property was manufactured for the purpose of sale, and the rest was used as a means of conducting its ordinary business, and all of it could have been sold by the corporation.

As the property sold by the sheriff was subject to seizure and sale under the ordinary writ of fieri facias, and was so sold by him, the fund realized was properly paid to the assignee of the plaintiff in the execution. The order of the court of common pleas of October 25, 1894, directing the sheriff to pay the money into court, is reversed and set aside at the cost of the appellee.

EXECUTION—EXEMPTIONS—CORPORATE PROPERTY.—Execution cannot be levied on corporate franchises, rights, or on property essential to the enjoyment thereof (*Susquehanna Canal Co. v. Bonham*, 9 Watts & S. 27; 42 Am. Dec. 315), sequestration being the only remedy of a creditor to obtain a satisfaction of his debts: *Plymouth R. R. Co. v. Cohoell*, 39 Pa. St. 337; 80 Am. Dec. 526, and note; *Overton Bridge Co. v. Means*, 33 Neb. 857; 29 Am. St. Rep. 514, and note.

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1. **THE POSSESSION OF A LIFE TENANT** is not adverse to the remainderman or reversioner. *Meacham v. Bunting*, 239.
2. **HUSBAND AND WIFE—ADVERSE POSSESSION.**—The possession of land by a husband as trustee, for the use and benefit of his wife, is not adverse to her, even after he has obtained a divorce. He can claim to hold adversely only by renouncing his title as trustee, surrendering possession, and retaking it. *Meacham v. Bunting*, 239.
3. **ADVERSE POSSESSION SUFFICIENT TO DEFEAT THE LEGAL TITLE** must be hostile in its inception, and continue uninterruptedly for twenty years, and must be acquired and retained under claim of title inconsistent with that of the true owner. *Meacham v. Bunting*, 239.

AFFIDAVITS.

See **APPEAL**, 5; **ATTACHMENT**, 1.

AGENCY.

See **CORPORATIONS**, 12; **INSURANCE**, 19, 21; **MECHANIC'S LIEN**.

ALIENATION.

See **DEFINITIONS**.

ALIENATION OF AFFECTIONS.

See **HUSBAND AND WIFE**, 1.

ALTERATION.

See **NEGOTIABLE INSTRUMENTS**, 2.

AMENDMENTS.

See **ACKNOWLEDGMENT**; **COURTS**.

ANIMALS.**LIABILITY FOR DEATH CAUSED BY SALE OF HORSE WITH GLANDERS.**—

The vendor of a horse affected with glanders and sold to an innocent purchaser by means of false representations is liable for the death of one who contracts the disease while having charge of the horse for the purchaser, if the vendor knew the disease to be imminently dangerous to human beings, and that getting it would be the natural and probable consequence of coming in contact with the animal. *State v. Fox*, 424.

See **CONTRACTS**, 2; **EVIDENCE**, 9; **PLEADING**, 1; **SALES**, 2.

APPEAL.

1. **THE RIGHT OF APPEAL FROM A JUDGMENT IS NOT WAIVED BY ITS PAYMENT** to avoid the sale of the judgment debtor's property under an execution issued for the enforcement of such judgment. *Green v. Hall*, 761.
2. The question whether the evidence sustains the judgment cannot be considered in the absence of a bill of exceptions properly authenticated, and a bill authenticated by the clerk of the court under circumstances not authorizing him to act is unavailing. *Glass v. Zutavern*, 763.
3. **OBJECTION THAT CANNOT BE CONSIDERED.**—That there is no evidence to support the hypothesis of a prayer for instructions is an objection

that cannot be considered on appeal, unless there appears in the record a special exception based upon that objection, signed and sealed by the judge. *Norfolk etc. R. R. Co. v. Hoover*, 392.

4. **BILL OF EXCEPTIONS—IDENTIFICATION OF EXHIBITS.**—Exhibits recited in a bill of exceptions as having been received in evidence and marked with certain marks are sufficiently identified by such marks without any recital that they are the instruments offered in evidence, provided that the bill certifies that the evidence therein set forth is all that was offered at the trial, and no other exhibits are found so marked. *Moses v. Loomis*, 194.
5. **RECORD.**—Affidavits filed in support of a motion to quash an indictment, though copied by the clerk into the record, are no part of the record on appeal, unless incorporated into the bill of exceptions. *Hiler v. People*, 221.
6. **IF INCOMPETENT EVIDENCE HAS BEEN ADMITTED AGAINST OBJECTION,** the objecting party may cross-examine upon or otherwise combat it without waiving his right to have the objection reviewed on appeal. *Barker v. St. Louis etc. R. R. Co.*, 646.
7. **HOMICIDE.—JUDGMENT OF APPELLATE COURT REFUSING BAIL** in a murder case does not deprive the accused of his right, upon final trial, to have all legitimate issues raised by the evidence passed upon by the jury, nor conclude the trial court from submitting to the jury the question of lesser degrees of homicide than murder in the first degree, suggested by the evidence. On final trial the case must be tried in the same manner and under the same rules of law as if it had never been before a court for any purpose, unless some question of evidence is settled by the appellate court in refusing bail. *Jones v. State*, 46.
8. **DEPOSITIONS—ERROR IN ADMITTING.**—It is reversible error to admit in evidence a deposition without a showing by the party wishing to use it that a statutory ground existed, and still exists, for taking it. *Davison v. Sherburne*, 618.
9. **INSTRUCTIONS UPON THE WEIGHT OF EVIDENCE** are erroneous. *Harkey v. State*, 19.
10. **VIEW OF PREMISES—INSTRUCTIONS.**—It is reversible error to instruct the jury that they may use as evidence in the case what they saw or learned upon a view of the premises. *Schultz v. Bower*, 630.
11. **REVERSAL OF JUDGMENT.—THE ERRONEOUS ADMISSION OF EVIDENCE** which could not properly have influenced the jury to a result different from that at which they arrived from the consideration of the other evidence in the cause does not justify a reversal of judgment. *Baltimore etc. R. R. Co. v. State*, 415.
12. **JURY TRIAL—HARMLESS ERROR.**—Though a charge to the jury is erroneous, yet, if it manifestly works no injury to the losing party, the judgment will not be reversed. *Mexican Cent. Ry. Co. v. Lauricella*, 103.

See HABEAS CORPUS; INJUNCTIONS, 3.

APPRAISEMENT.

See INSURANCE, 8.

ARBITRATION.

See INSURANCE, 10, 11.

ARREST.

CRIMINAL LAW—SEARCH OF PERSON FOR EVIDENCE OF CRIMINALITY.—

A person while in custody on a criminal charge may be subjected to a personal search and examination against his will, in order to discover upon him evidence of his criminality. *Rusher v. State*, 175.

ASSESSMENTS.

See INJUNCTIONS, 3; MUNICIPAL CORPORATIONS, 12.

ASSIGNMENT.

See DOWER, 4, 5; EVIDENCE, 10; INSURANCE, 18; JUDGMENTS, 8; MORTGAGEE'S LIEN, 11, 12; TROVER, 1.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

See CORPORATIONS, 13, 15; LANDLORD AND TENANT, 3, 4.

ASSOCIATIONS.

1. **BUILDING AND LOAN ASSOCIATIONS PROPER** are organizations created for the purpose of accumulating funds by monthly subscriptions or savings of members to assist them in building or purchasing for themselves dwellings or real estate, by loaning to them the requisite money from the funds of the society upon good security; but such associations have no power to declare or pay dividends on their stock, make loans at a usurious rate of interest, or carry on a banking business, and whenever they do these things they cease to be building and loan associations, and are not governed by or entitled to privileges under laws providing for the organization and management of such societies. *Meroney v. Atlanta Building etc. Assn.*, 841.
2. **FOREIGN BUILDING AND LOAN ASSOCIATIONS** whose charters invest them with powers greatly in excess of and not contemplated by a local statute are not building and loan associations within the purview of such statute, and are not entitled to claim any special rights or powers therein granted to such associations as are organized according to its terms, with the limited powers and restricted purposes therein set out. *Meroney v. Atlanta Building etc. Assn.*, 841.
3. **USURY.—TRANSACTIONS BETWEEN BUILDING AND LOAN ASSOCIATIONS** and their borrowing stockholders are simply loans, and usurious if they require the payment of more than the amount loaned and legal interest. *Meroney v. Atlanta Building etc. Assn.*, 841.
4. **USURY.—NO DEVICE OR COVER** can be resorted to by building and loan associations by which they can legally take from those who borrow their money more than the legal rate of interest, without incurring the penalties of usury laws. *Meroney v. Atlanta Building etc. Assn.*, 841.

ATTACHMENT.

1. **AFFIDAVIT DEFECTIVE, WHEN NOT VOID.—**An affidavit in attachment stating the names of the parties, the amount of indebtedness, that defendant has concealed himself to avoid service of process, and that his whereabouts are unknown, though defective in failing to state the nature of the indebtedness, the defendant's place of residence, or that such place is unknown, or cannot, upon diligent inquiry, be ascer-

- tained, is voidable, but not void, and is sufficient to give the court jurisdiction of the subject matter. *Hogue v. Corbit*, 232.
2. A JUDGMENT MAY BE GARNISHED in a suit against the judgment creditor when the process of garnishment issues from the same court, but not otherwise. *Scott v. Rohman*, 767.
 3. ATTACHMENT LIEN.—FAILURE OF OFFICER TO MAKE RETURN on or before the return day does not affect the lien of the plaintiff under an attachment. *Hogue v. Corbit*, 232.
 4. ATTACHMENT LIEN.—A GENERAL PERSONAL JUDGMENT against defendant in attachment, upon personal service, does not quash the lien of the attachment levied upon his property, although, after judgment, another levy is made upon the same property under the special execution awarded on the judgment. *Hogue v. Corbit*, 232.
- See ESTOPPEL, 4.

BAIL.

- RES JUDICATA.**—IF BAIL IS GRANTED after indictment found, the accused cannot be rearrested for the same offense on a new indictment and bail refused. The right to bail is *res judicata*. *Ex parte Augustine*, 17.
- See APPEAL, 7.

BAILMENT.

1. A LIVERY-STABLE KEEPER MUST TRY TO INFORM HIMSELF of the habits of horses kept in his stable for use in his business, and evidence to the effect that he had kept a horse in his use for one or two years, and that different persons who had never owned the horse knew of his viciousness, warrants the jury in finding that the viciousness was known to the owner, or that it could have been known to him had he exercised reasonable care. *Lynch v. Richardson*, 444.
2. A LIVERY-STABLE KEEPER IS LIABLE for injuries suffered by his customer from a horse that had the habit of viciously kicking and trying to run away when starting for home, if he knew of the existence of this habit, or by the exercise of reasonable care to ascertain whether the horse was suitable for the use of hirers, he ought to have known that it was dangerous. *Lynch v. Richardson*, 444.

BANKS.

1. A CLEARING-HOUSE ASSOCIATION organized by national banks in a certain locality to facilitate the settlement of daily balances between them, involving no element of speculation, and no business undertaking by or on behalf of such banks, is not a violation of the statutes of the United States relating to national banks, and does not transcend the limits which these statutes have drawn about the business of banking. *Philler v. Patterson*, 896.
2. CLEARING-HOUSE—HOLDER OF NEGOTIABLE SECURITIES.—A clearing-house association formed by national banks solely to facilitate the settlement of daily balances between them, without handling and counting the cash in every instance, may require each bank to deposit with certain persons, called the clearing-house committee, a sum of money, or its equivalent in good securities, to be used in the payment of balances, for which the committee shall issue certificates, to

be used in lieu of the cash they represent; and may authorize the committee to receive from any member of the association additional deposits of bills receivable and other securities, and issue certificates therefor. The committee then become holders for value of securities and notes deposited with and receipted for by them, and for which they have issued certificates, and as such are not affected by equities existing between the original parties thereto. *Philler v. Patterson*, 896.

3. POWER OF AGENT TO INDORSE CHECK—MISAPPLICATION OF MONEY.—

The secretary and active manager of a building association who is also its general financial agent and custodian of its securities, with power to collect them and "to receive all moneys and pay the same over to the treasurer," has implied power to indorse a check payable to the order of the association, and if, after such indorsement, he deposits the check to the credit of his personal account, the bank receiving the deposit in good faith and due course of business is not liable for his misappropriation of the money paid out on his individual checks. *Gate City Building etc. Assn. v. National Bank*, 633.

4. INSOLVENCY—ASSETS—STATE LIEN.—PROMISSORY NOTES held by an insolvent bank against depositors are assets of the bank only as to the balances due after deducting the deposits. Hence, if a bank, being a state depository, becomes insolvent while indebted to the state, and its effects are put into the hands of a receiver, the lien of the state can attach only to such balances. *State v. Brobston*, 138.

See CHECKS; NEGOTIABLE INSTRUMENTS, 1; SETOFF, 2, 3.

BIGAMY.

1. AN INDICTMENT FOR BIGAMY SUFFICIENTLY AVERS that the first wife is yet living by referring to her as "being then living," and to defendant as "well knowing" that she was then alive, and as "never having been legally divorced" from her. *Hiler v. People*, 221.

2. TWO SUCCESSIVE MARRIAGES, one legal and innocent, the other penal but actual, must be proved against defendant to establish bigamy. *Hiler v. People*, 221.

3. PROOF OF MARRIAGE.—If a common-law marriage is relied upon to sustain a conviction of bigamy, a contract *per verba de presenti*, with proof of cohabitation and all the elements necessary to constitute such marriage, must be proved. *Hiler v. People*, 221.

4. COHABITATION, REPUTE, AND DECLARATIONS of a man and woman do not constitute a marriage on which a conviction for bigamy can be based by reason of an actual subsequent marriage. *Hiler v. People*, 221.

5. THE FACT THAT THE DEFENDANT PROSECUTED FOR BIGAMY OR POLYGAMY HAD A BONA FIDE AND REASONABLE BELIEF when contracting the second marriage that his first wife was dead does not entitle him to an acquittal. *Commonwealth v. Hayden*, 468.

6. EVIDENCE.—ON A PROSECUTION FOR BIGAMY A LETTER WRITTEN AND SIGNED BY THE DEFENDANT and describing himself as the son in law of the person to whom it is addressed is admissible in evidence against him as tending to prove his marriage to the daughter of the addressee. *Commonwealth v. Hayden*, 468.

7. EVIDENCE.—IN A PROSECUTION FOR BIGAMY AN ATTESTED COPY OF THE RECORD OF THE MARRIAGE of the defendant from the records of the

city registrar, certified by his assistant, is admissible. *Commonwealth v. Hayden*, 468.

8. EVIDENCE OF A WITNESS WHO PERFORMED A MARRIAGE CEREMONY that he was a clergyman and an ordained minister at the time of such celebration, and had been such for many years, is admissible in a prosecution for bigamy, because it is, at least, competent to prove that he was de facto discharging the duties of an ordained minister. *Commonwealth v. Hayden*, 468.
9. EVIDENCE.—IN A PROSECUTION FOR BIGAMY THE TESTIMONY OF A WIFE is admissible to prove the defendant's marriage to her. *Commonwealth v. Hayden*, 468.
10. COMPETENCY OF FIRST WIFE AS WITNESS.—On a trial for bigamy the first wife is incompetent as a witness against the defendant to establish the marriage, and error in admitting her testimony is not cured by subsequently excluding it. *Hiler v. People*, 221.

BILLS AND NOTES.

See NEGOTIABLE INSTRUMENTS.

BILLS OF EXCEPTIONS.

See APPEAL, 2, 4, 5.

BOARDS OF HEALTH.

1. LEGISLATIVE POWER—DELEGATION OF.—A state board of health may, by the legislature, be authorized to establish a quarantine system for the purpose of preventing immigrants and other persons from entering the state and going from place to place within it who, in the opinion of the board, or an inspector appointed by it, are likely to carry infectious diseases, and generally to establish quarantine regulations and rules and detain and disinfect baggage and other property. *Hurst v. Warner*, 525.
2. CONSTITUTIONAL LAW—QUARANTINE REGULATIONS.—It is within the power of the legislature to make it unlawful for any person to refuse to permit his baggage and personal effects to be disinfected in accordance with rules and regulations formulated by the state board of health. *Hurst v. Warner*, 525.
3. QUARANTINE LEGISLATION—STATE BOARD OF HEALTH, UNAUTHORIZED RULES AND REGULATIONS OF.—Though a state board of health is authorized to establish general rules, and, by an inspector acting by its authority, to detain railway cars and other public or private conveyances whenever it appears that such cars or other conveyances contain any passenger or personal property which has been exposed to any dangerous, communicable disease, it is not authorized to subject the baggage of all immigrants to disinfection, whether such immigrants come from a locality where any dangerous, communicable disease exists or not. *Hurst v. Warner*, 525.

BOUNDARIES.

EVIDENCE OF COMMON REPUTE AS TO A BOUNDARY established under the United States system of surveys is competent where the monuments set in making those surveys have disappeared. *Thorn v. Reels*, 600.

See WATERS, 9-11.

BRIDGES.

See MUNICIPAL CORPORATIONS, 17; WATER, 2.

BUILDING AND LOAN ASSOCIATIONS.

See ASSOCIATIONS.

BURDEN OF PROOF.

See CARRIERS, 2, 3; MUNICIPAL CORPORATIONS, 26.

BURGLARY.

1. **DISCOVERY OF PROPERTY—PRISONER'S ACTS AND DECLARATIONS.**—In a prosecution for burglary, where money was stolen, the independent fact that the money was found soon afterward is admissible in evidence; and the prisoner's acts and declarations necessary to account for the discovery and to explain the manner of it, if not obtained by criminal violence, are also admissible for this purpose, but not as a confession of guilt. *Rusher v. State*, 175.
2. **DEFENDANT MAY BE REQUIRED TO POINT OUT STOLEN PROPERTY.**—One arrested for burglary, where money has been stolen, may be ordered to point out the place where he has concealed it, and may be induced to do so by those having him in custody, either by operating on his hopes or his fears, provided they use no unlawful violence; and this does not contravene the constitutional provision that "no person shall be compelled to give testimony tending in any manner to criminate himself." *Rusher v. State*, 175.

CARRIERS.

1. **DUTY TO EXAMINE GOODS.**—A common carrier is not compelled to break open packages offered to him for transportation, in order to ascertain whether they contain goods which he is prohibited from having in his possession, nor can he be held liable for a failure to make such examination in the absence of circumstances arousing, or calculated to arouse, his suspicions. *State v. Swett*, 306.
2. **CARRIERS OF LIVESTOCK—NEGLIGENCE—LIMITATION OF LIABILITY.**—In an action founded on the common-law liability of a carrier to recover for injury to livestock during transportation, the burden of proof as to any limitation thereon by special contract is on the carrier. Unless such limitation is admitted or clearly established by proof, the question is for the jury. *Schaeffer v. Philadelphia etc. R. R.*, 884.
3. **CARRIERS OF LIVESTOCK—NEGLIGENCE—OPINION EVIDENCE.**—In an action against a carrier to recover for injury to livestock during transportation, after evidence is presented to show that the animals were in good condition when received by the carrier, that the injuries were of recent occurrence, and not such as they would have inflicted upon each other, except involuntarily by being thrown down and trampled upon, or being jammed together by a collision or rough handling of cars, witnesses who have been for years engaged in shipping such animals, who know their habits and the causes likely to lead to their injury while on cars, and who saw the injured animals when they were unloaded, are competent to express an opinion as to the cause of the injuries. *Schaeffer v. Philadelphia etc. R. R.*, 884.

See GAME LAWS; RAILROADS, 9-19.

statement to their alleged injury, it was held that the trial judge erred in excluding evidence offered by the defendant for the purpose of showing that the words were not used in the sense in which they were interpreted by the court, and that he acted honestly and without intention to state anything falsely. *Nash v. Minnesota Title Ins. etc. Co.*, 489.

4. **MISREPRESENTATION, RESCISSION, WHEN DOES NOT DEFEAT THE RIGHT TO RECOVER FOR.**—If a third person makes a misrepresentation by the aid of which the owner of property, by the fraudulent use of the misrepresentation, is enabled to sell it, and the purchaser, discovering the fraud and misrepresentation, elects to rescind, this will not destroy his right to recover of the person making the misrepresentation the damages suffered thereby, so long as the purchaser has failed to obtain satisfaction, for his injury either by the restoration or recovery of the consideration, or otherwise. *Nash v. Minnesota Title Ins. etc. Co.*, 489.

See CORPORATIONS, 8-10, 13, 15; DEEDS, 5; INSURANCE, 19, 22; LIMITATIONS OF ACTIONS; SALES, 4.

FRAUDULENT CONVEYANCES.

See CHATTEL MORTGAGES, 1, 3-6; HUSBAND AND WIFE, 2.

FUGITIVES.

See EXTRADITION.

GAMING.

PUBLIC HOUSE.—THE CLUBROOM OF A PRIVATE INCORPORATED SOCIAL CLUB, in which liquors are sold only to members, and the receipts used only to keep up and replenish the stock of liquor for the club, is not a "public house" nor a "house for retailing spirituous liquors" within the meaning of a statute imposing a fine on any person who plays any game of cards in such house. *Koenig v. State*, 35.

See INDICTMENT, 2.

GAME LAWS.

CARRIER'S LIABILITY.—A common carrier who knows that closed packages delivered to him for transportation contain lobsters, but does not know, nor have reason to believe, that they are of a kind which he is prohibited by law from having in his possession, does not, by retaining such possession for the purpose of transportation without examination, render himself liable for a penalty imposed by statute. *State v. Swett*, 306.

GARBAGE.

See MUNICIPAL CORPORATIONS, 1.

GARNISHMENT.

See ATTACHMENT, 2.

GENERAL AVERAGE.

See SHIPPING, 1-3.

GRAND JURY.

See INDICTMENT,

GRANTS.

See **WATERS**, 9-11.

HABEAS CORPUS.

1. **SECTION OF CODE CONSTRUED.**—A code section stating that, "until the legislature shall otherwise provide, this code shall not affect proceedings on habeas corpus," etc., applies only to the application for the writ and its hearing, and not to the manner of reviewing the judgment thereon or its removal for such purpose. *In re Van Sciever*, 730.
2. **JUDGMENT ON, HOW REVIEWED.**—Under the laws of Nebraska a habeas corpus case is in the nature of a civil proceeding, and is reviewable by petition in error as in other cases. Hence, there must be a motion for a new trial, embodying the errors of which complaint is made, and a ruling of the trial court obtained thereon; but, as the right to personal liberty is involved, the rule requiring such a motion will not always be enforced if a reasonable excuse is given for not making the motion. *In re Van Sciever*, 730.

See **EXTRADITION**.

HIGHWAYS.

See **RAILROADS**, 2-5.

HOMICIDE.

1. **CONDITION OF MIND QUESTION FOR JURY.**—Whether the mind of the accused is cool, or disturbed and enraged at the time of the killing, is a question of fact and not of law, and relates to the actual condition of mind at that time, and not to its status merely from lapse of time between the provocation and the killing, although such lapse of time may enter into the case as a fact to be determined by the jury. *Jones v. State*, 46.
2. **HOMICIDE IN DEFENSE OF ANOTHER—MANSLAUGHTER.**—If the accused, seeing the origin of a difficulty between others, and knowing that one of them is in no danger, but that the interference with the latter by the deceased and his son is to prevent him from injuring the party with whom he is having the trouble, and the accused, with a sedate and deliberate mind, then forms a plan to kill, and does kill, the deceased, he is guilty of murder in the first degree, and not manslaughter. *Reynolds v. State*, 25.
3. **INSULT TO FEMALE—MANSLAUGHTER.**—Under a statute providing that "insulting words or conduct of the person killed toward a female relative of the party guilty of the homicide is deemed adequate cause to reduce the offense from murder to manslaughter, if the killing took place as soon thereafter as the party killing may meet with the person killed after having been informed of such insults," the law prescribes no limit to the subsidence of the passion supposed to have been engendered by the information received up to the time of the first meeting, provided the passion is such as renders the mind incapable of cool reflection, and actually exists from adequate cause at the time of the killing. *Jones v. State*, 46.
4. **INSULT TO FEMALE—MANSLAUGHTER.**—On a trial for a killing by the accused upon the first meeting with the party killed after information

of insulting words or conduct by the latter toward a female relative of the former, the failure of the court to submit the issue of manslaughter to the jury is error, and is tantamount to deciding the extenuating evidence of the accused against him. *Jones v. State*, 46.

5. INSULT TO FEMALE—MANSLAUGHTER.—On the trial for a killing by the accused on the first meeting with the deceased after receiving information of insulting conduct by the latter toward a female relative of the former, the facts must be viewed from the standpoint of the accused, and if adequate cause and passion existed in his mind his crime could be of no higher grade than manslaughter, although the insulting conduct had never occurred, provided he believed it had. *Jones v. State*, 46.

6. INSULT TO FEMALE—MANSLAUGHTER—EVIDENCE.—On a trial for murder evidence that the deceased had committed a rape on the wife of the accused prior to his marriage is admissible upon the issue of manslaughter raised by a defense that the killing was caused by insulting conduct by the deceased toward the wife of the accused, both prior and subsequent to his marriage. *Jones v. State*, 46.

See APPEAL, 7.

HUSBAND AND WIFE.

1. A MARRIED WOMAN MAY MAINTAIN AN ACTION FOR THE ALIENATION OF HER HUSBAND'S AFFECTIONS if the statute of the state entitles her, while married, to sue and be sued as if she were unmarried. *Hodgkinson v. Hodgkinson*, 759.

2. TRUSTS.—A naked trust in land conveyed to a husband for the use and benefit of his wife is not executed by the statute of uses during the marriage, and the legal title remains in the husband. *Meacham v. Bunting*, 239.

3. PRESUMPTION OF FRAUD.—If a mortgage from a husband to his wife must prevent his creditors from realizing their claims against him, it is presumed to be fraudulent, and she must assume the burden of proving that it was made in good faith. *Glass v. Zutavern*, 763.

4. ESTOPPEL AGAINST HUSBAND AND HIS GRANTEE.—If a husband executes a conveyance with covenants of warranty of lands belonging to his wife which is void as against her because of defects in execution, he is estopped, as against innocent purchasers from his grantee, from asserting title subsequently acquired by him in the same lands by the death of his wife. *Stone v. Sledge*, 65.

5. IN A CONVEYANCE BY A MARRIED WOMAN OF HER SEPARATE ESTATE SHE MUST BE DESCRIBED AS THE GRANTOR.—Her signing and acknowledging such instrument with her husband when he alone is described therein as grantor does not affect her title. *Stone v. Sledge*, 65.

6. ESTOPPEL—MARRIED WOMAN.—If a husband executes a deed which is also signed by his wife, but is void as to her because defectively executed, and the consideration of the conveyance is a transfer of other tracts of land to him, she is not, by her subsequent joinder in a conveyance to a third person of the lands so acquired by her husband, estopped from denying the validity of the original deed. *Stone v. Sledge*, 65.

See ADVERSE POSSESSION, 2; CURTESY; DOWER; SPECIFIC PERFORMANCE, 2-4; WITNESSES, 4, 5.

IMPEACHMENT.

See WITNESSES, 10.

IMPROVEMENTS.

See DOWER, 4.

INDICTMENT.

1. **GRAND JURORS AS WITNESSES.**—An indictment is not void because one of the grand jurors appeared as a witness before the grand jury of which he was a member. A grand jury may properly act upon the personal knowledge of one of its members communicated to his fellows under no other sanction than the grand juror's oath. *Commonwealth v. Hayden*, 468.
2. **IDENTIFICATION.**—An indictment charging the accused with "playing cards in a house for retailing spirituous liquors" is sufficiently identified if the names of the parties and the proper number of the bill is stated, although the minutes of the court in which the indictment was first presented show that he was charged with playing cards in a public place. *Koenig v. State*, 35.
3. **CRIMINAL PRACTICE.**—A MOTION TO DISMISS AN INDICTMENT cannot be sustained upon any ground which does not appear upon the record of the cause. *Commonwealth v. Hayden*, 468.

See APPEAL, 5; BIGAMY, 1; FORGERY.

INDORSEMENT.

See CHECKS, 2, 3; NEGOTIABLE INSTRUMENTS, 2, 3.

INFANTS.

See MASTER AND SERVANT, 4, 5; NEGLIGENCE, 6; PARTNERSHIP, 2; REAL PROPERTY, 5-7.

INFORMATION.

See QUO WARRANTO.

INJUNCTIONS.

1. **AN INJUNCTION AGAINST THE ENFORCEMENT OF A VOID MUNICIPAL ORDINANCE** should be granted when there is no plain, adequate remedy at law, and it is necessary to prevent irreparable injury. *Austin v. Austin City Cemetery Assn.*, 114.
2. **INJUNCTION AGAINST A VOID MUNICIPAL ORDINANCE FORBIDDING, AND MAKING CRIMINAL, INTERMENTS IN A CEMETERY**, may be issued by a court of equity. *Austin v. Austin City Cemetery Assn.*, 114.
3. **MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENT.**—Owners of property benefited by a change of street grade, and on whom it is sought to levy a special tax or assessment to pay the damages caused by such change, have an adequate remedy given by statute to defend in the proceedings to obtain the tax judgment, and to have such judgment reviewed in the supreme court, and they cannot, therefore, restrain by injunction the proceedings to assess such special tax for benefits on the ground of irregularities in the assessment proceedings. *Kelly v. Minneapolis*, 605.

INSANE PERSONS.

DISAFFIRMING CONTRACT WITH.—One contracting with an insane person has no right to disaffirm or avoid the contract, though not aware of the insanity at the time of contracting. The right to avoid is for the personal protection of the lunatic, and those who deal with him have no corresponding right, unless they have been misled by fraudulent misrepresentations. *Atwell v. Jenkins*, 463.

INSOLVENCY.

1. **CONFLICT OF LAWS.**—A NONRESIDENT CREDITOR is not barred by a discharge in insolvency granted here unless he has come in and submitted himself to the jurisdiction of the court. If he thus comes in and proves his claim and takes a dividend on it, or if he accepts a sum offered under composition proceedings, he is held to have waived his right of objection. *Pattie v. Paige*, 459.
2. **CONFLICT OF LAWS.**—A NONRESIDENT CREDITOR HAVING A CLAIM AGAINST TWO INSOLVENT FIRMS, both included in the same proceedings in insolvency, one consisting of two members, and the other of the same two members and a third, who proves his claim against the latter firm, votes for an assignee, and receives a dividend, is not precluded from maintaining an action against the other firm upon the demand against it. *Pattie v. Paige*, 459.

See BANKS, 4; CORPORATIONS, 14-19; SETOFF.

INSTRUCTIONS.

See ACCESSARIES, ETC.; APPEAL, 3, 9, 11, 12; TRIAL, 10, 11; WILLS, 14
WITNESSES, 6.

INSURANCE.

1. **RECOVERY OF PREMIUMS.**—The liability of an insurance company for a return of premiums is not absolute, but depends upon whether the policy has become a binding contract between the parties. If it has, and the risk has commenced, there can be no apportionment, and no action lies for the recovery of the premiums paid. *Mailhot v. Metropolitan Ins. Co.*, 336.
2. **AN AMBIGUOUS EXPRESSION** in a policy of fire insurance must be construed against the insurer and favorably to the insured. *Minneapolis Threshing Machine Co. v. Firemen's Ins. Co.*, 572.
3. **CONSTRUCTION OF PHRASE, "WHILE NOT IN USE."**—Property consisting of a threshing-machine, engine and separator, insured against loss by fire "while not in use," is not "in use" where it has not been used for threshing for two weeks, is hauled into the country, and is left standing in readiness for use a few days later. Therefore, if the separator while thus standing is destroyed by fire, not caused by any hazard incident to the actual use or operation of either the engine or separator, the insurer is liable. *Minneapolis Threshing Machine Co. v. Firemen's Ins. Co.*, 572.
4. **FIRE INSURANCE—INSURABLE INTEREST.**—If a vendor sells land on which insured buildings stand and parts with all his title, he thereafter has no insurable interest in the buildings, and the mere holding of a judgment for part of the purchase money does not confer an insurable interest.

- est, and no recovery can be had on a policy given for the protection of the judgment. *Light v. Countrymen's etc. Ins. Co.*, 904.
5. **FIRE INSURANCE—INSURABLE INTEREST—ESTOPPEL.**—If a policy of insurance exists upon buildings at the time the land upon which they stand is sold and conveyed, and it is continued in force in favor of the vendor by a voluntary agreement between himself and the insurer, and the assessment and collection of premiums up to the time of the loss of the buildings by fire, the insurer is liable for the loss, and estopped from asserting a want of insurable interest in the vendor. *Light v. Countrymen's etc. Ins. Co.*, 904.
 6. **ENTIRETY OF CONTRACT FOR.**—If a building and certain articles of personalty therein are separately valued and insured for specific sums, and the premium paid for the insurance is a gross sum, and the policy contains a condition that "this entire policy shall be void if the subject of insurance be a building on ground not owned by the assured in fee simple," and the building so insured is not so owned, the policy, being indivisible, is wholly void, and no recovery may be had for the personal property insured. *Bills v. Hibernia Ins. Co.*, 121.
 7. **PROOF OF LOSS BY MORTGAGOR OR MORTGAGEE.**—Proof of loss stipulated for in a policy of fire insurance must be made within the time stipulated, as a condition precedent to the payment of the loss. If the property is mortgaged the mortgagee must comply with the requirement, if the mortgagor fails or refuses to do so, as such proof must be furnished by one or the other, in every case, unless waived by the insurance company, and cannot be dispensed with by what is called the "New York Standard Mortgage Clause," declaring that no act or neglect of the mortgagor shall defeat the insurance as to the interest of the mortgagee. *Southern Home Building etc. Association v. Home Ins. Co.*, 147.
 8. **CONSTRUCTION OF CLAUSE AS TO ACT OR NEGLECT OF MORTGAGOR.**—A clause in a policy of fire insurance declaring that no act or neglect of the mortgagor shall defeat the insurance as to the interest of the mortgagee refers to acts or neglect in connection with the property; while the risk is subsisting, and which under the terms of the policy would invalidate the insurance, such as conduct increasing the hazard, and not the omission, after the fire has occurred, to comply with provisions designed to secure evidence as to the nature and extent of the loss. *Southern Home Building etc. Assn. v. Home Ins. Co.*, 147.
 9. **APPRAISEMENT OF AMOUNT OF LOSS.**—If an insurance corporation selects an appraiser who resides one hundred and thirty-five miles distant from the place of the loss, and he, because of his want of acquaintance with that locality, refuses to join in the selection of any umpire other than persons living in other distant parts of the state, though furnished with a list of twelve persons acceptable to the assured residing in the town in which the property destroyed was situate, this is equivalent to a refusal by the insurer to proceed with the appraisement, and entitles the assured to maintain an action as if the appraisement had been waived. *Brock v. Dwelling House Ins. Co.*, 562.
 10. **AMOUNT WRITTEN IN POLICY CONTROLS.**—The amount written in a policy of fire insurance on real property must be taken as the true amount of the loss, if the property is wholly destroyed, where the statute provides that, in case of total destruction, such amount shall be taken as the true value of the property, amount of loss, and measure

- of damages; and any provision in the policy attempting to limit the amount to a less sum is void. *Home etc. Ins. Co. v. Bean*, 711.
11. **DEMAND FOR ARBITRATION WAIVES PROOFS OF LOSS.**—If an insurance company makes a demand for arbitration, it is a waiver of the proofs of loss. *Home etc. Ins. Co. v. Bean*, 711.
 12. **ARBITRATION—VOID AS OUSTING COURTS OF JURISDICTION.**—A provision in a policy of fire insurance that no action against the company shall be sustained in any court of law or chancery until after an award shall have been obtained by arbitration fixing the amount due after a loss is void, as it ousts the courts of their jurisdiction. *Home etc. Ins. Co. v. Bean*, 711.
 13. **VACANCY OF PREMISES.**—If a policy of insurance provides that if the insured building should become vacant or unoccupied without the consent of the company indorsed on the policy it shall at once become null and void, and any unearned premium will be returned on a surrender of the policy, a temporary vacancy of the building, though without the knowledge of the owner, terminates the policy, and the subsequent reoccupancy of the building does not revive the policy unless the forfeiture has been waived. *East Texas etc. Ins. Co. v. Kempner*, 99.
 14. **LIFE INSURANCE, INSURABLE INTEREST.**—Public policy does not allow any one having no insurable interest to be the owner of a policy of insurance upon the life of a human being. The public has an interest, independent of the consent and concurrence of the parties, that no inducement shall be offered to one man to take the life of another. *Cheeves v. Anders*, 107.
 15. **LIFE INSURANCE—LIMIT OF INTEREST IN LIFE OF ANOTHER.**—If the interest which one person has in the life of another is of a definite character, as where he is a creditor, or when he from the life of the insured may reap some pecuniary advantage of a definite nature, and the policy is taken out in his favor and is assigned to him, his interest will be limited to the amount of interest which he has in the amount of the insurance, together with such amount as he has paid to procure the policy with interest thereon. *Cheeves v. Anders*, 107.
 16. **LIFE INSURANCE.—WANT OF INSURABLE INTEREST** on the part of an assignee of a life insurance in the person whose life is insured does not release the insurer. He must perform his contract, leaving the law to dispose of the proceeds among the persons found entitled thereto. *Cheeves v. Anders*, 107.
 17. **LIFE INSURANCE.—THE INSURABLE INTEREST WHICH ONE PARTNER HAS AS SUCH IN THE LIFE OF ANOTHER** ceases on the dissolution of the firm. *Cheeves v. Anders*, 107.
 18. **LIFE INSURANCE.—THE INSURABLE INTEREST WHICH A PARTNERSHIP HAS IN THE LIFE OF ONE OF ITS MEMBERS**, where he does not owe the firm anything and its property is sufficient to discharge its obligations, is limited to the premiums paid out of the partnership assets, with interest thereon. Therefore, on the death of the insured partner, his heirs or representatives are entitled to all the proceeds of the insurance upon his life, except such as will reimburse the other partner for his share of the moneys paid for such insurance, with interest. *Cheeves v. Anders*, 107.
 19. **LIFE INSURANCE.—IF A POLICY IS ASSIGNED TO A PERSON HAVING NO INSURABLE INTEREST** in the life of the person insured, such assignee will hold the proceeds as trustee for the benefit of those entitled to receive them. *Cheeves v. Anders*, 107.

20. **LIFE INSURANCE.—FRAUDULENT ACTS OF AN INSURANCE AGENT** in sending an application and certificate of medical examination fraudulent in whole or in part to his company, upon which it acts in issuing a policy, is a fraud upon the company alone, and the insured cannot complain after the company has treated the policy as a binding contract. *Malhoit v. Metropolitan etc. Ins. Co.*, 336.
21. **LIFE INSURANCE—WAIVER OF CONDITIONS.**—An application for life insurance and medical examination are preliminaries solely for the benefit and protection of the insurer in issuing the policy. He may entirely dispense with or waive them, and issue a policy which is valid and binding. *Malhoit v. Metropolitan etc. Ins. Co.*, 336.
22. **LIFE INSURANCE—FRAUD IN EFFECTING—RECOVERY OF PREMIUMS.**—A policy of life insurance regular in every respect, except that through the fraud of the insurance agent there has been no medical examination of the insured, and the application has not been signed by him, although it purports to have been, and the whole transaction has taken place without his knowledge or consent, is voidable at the election of the insurer, but not absolutely void, and the insured cannot recover premiums paid thereon if the insurer has treated the policy as a valid subsisting contract. *Malhoit v. Metropolitan etc. Ins. Co.*, 336.
23. **LIFE INSURANCE—FRAUD IN PROCURING—RECOVERY OF PREMIUMS.**—An insured person induced by false representations material to him to take out a policy upon his life may elect to rescind and avoid the policy, and is then entitled to recover the premiums paid, but if such false representations are not material to him, and are a fraud upon the insurer alone, he is not entitled to recover. *Malhoit v. Metropolitan etc. Ins. Co.*, 336.
24. **DEATH BY "ACCIDENT"** means death from any unexpected event which proceeds from an unknown and unforeseen cause, happening without the design of the person acted upon. *Lovelace v. Travelers' Protective Assn.*, 638.
25. **ACCIDENT.—DEATH FROM DIRECT VIOLENCE** of a third party may be an accident within the meaning of a policy insuring the life of the deceased. *Lovelace v. Travelers' Protective Assn.*, 638.
26. **ACCIDENT.—GROSS NEGLIGENCE** of the insured does not defeat recovery upon an accident insurance policy. *Lovelace v. Travelers' Protective Assn.*, 638.
27. **ACCIDENT, WHAT IS.**—A hotel guest, who during the illness and absence of the proprietor voluntarily attempts to remove a third person from the hotel office by force for boisterous conduct, and is killed by him in the attempt, suffers death by accident within the meaning of a policy merely insuring against "death by accident." *Lovelace v. Travelers' Protective Assn.*, 638.
28. **PLEADING — NONPREJUDICIAL ERROR.**—If a policy of fire insurance, as an exhibit, is made part of the petition, and is admitted by the answer, it becomes a part of the record. Hence, if some of its provisions are again pleaded in the answer as substantive matters of defense, and the answer is demurred to, it is not prejudicial error to sustain the demurrer. *Home etc. Ins. Co. v. Bean*, 711.

INTEREST.

- WHEN DEDUCTED ON ENTERING JUDGMENT.**—Unearned interest paid in advance must be deducted from the amount of recovery, in entering

judgment on notes before maturity, at the election and by the voluntary act of the payee. *Illinois Steel Co. v. O'Donnell*, 245.

See ASSOCIATIONS; LEGACIES, 2, 3; MORTGAGES, 2; USURY.

INTERSTATE COMMERCE.

1. **ORIGINAL PACKAGE.**—If bottles of intoxicating liquor, each inclosed in a sealed paper box, and all the paper boxes packed in a wooden box, are shipped from one state to another, where each sealed paper box is sold separately, the wooden box, and not each sealed paper box, is the "original package"; and such sale, without authority, is in violation of the state law regulating the license and sale of malt, spirituous, and vinous liquors. *Haley v. State*, 718.
2. **TELEGRAPH COMPANIES.**—Telegraph messages transmitted by a company from and to points within one state, although traversing another state in the route, do not constitute interstate commerce, and are subject to the tariff imposed by the state. *Leavell v. Western Union Tel. Co.*, 798.
3. **INTOXICATING LIQUORS.**—A statute providing that no action shall be maintained in the state upon any claim or demand for intoxicating liquors purchased out of the state with intention to sell them, or any part thereof therein, is not in violation of that clause of the federal constitution giving to Congress the power to regulate commerce between the states, when applied to a purchase made outside the state with intent to sell at retail therein in violation of its law. *Knowlton v. Doherty*, 349.
4. **CONSTITUTIONAL LAW.**—A statute forbidding transportation of diseased or infected livestock through the state is void as an attempt to regulate or prohibit interstate commerce. *Grimes v. Eddy*, 653.
5. **CONSTITUTIONAL LAW—DISEASED ANIMALS.**—Although a state has no power to prohibit the transportation of infected livestock through it by common carriers, it has the right to restrict the manner and mode of such transportation to railroads and steamboats, if necessary to prevent the spread of contagion and disease. *Grimes v. Eddy*, 653.

INTOXICATING LIQUORS.

CONFLICT OF LAWS.—A vendor who sells intoxicating liquors in one state where such sale is valid to a purchaser who intends to sell them at retail in another state where such sale is illegal cannot maintain an action for their price in the latter state if such action is prohibited by statute, although he did not know of the illegal intention of the purchaser nor participate therein. *Knowlton v. Doherty*, 349.

See GAMING; INTERSTATE COMMERCE, 1, 2.

JOINT LIABILITY.

1. **JUDGMENT AGAINST COTRESPONDERS.**—An unsatisfied judgment against one tort-feasor upon which execution has issued is no bar to a suit against another. *Cleveland v. Bangor*, 326.
2. **JUDGMENT AGAINST COTORTFEASORS.**—An unsatisfied judgment against a street railway for injury received by reason of an obstruction in a street is no bar to an action against the city for the same cause of action. *Cleveland v. Bangor*, 326.

JOINT TENANCY.

See CO-TENANCY, 2, 2.

JUDGES.

DISQUALIFICATIONS. — That the same question of law arises, or the same character of facts is involved in two prosecutions, does not disqualify a judge from sitting in one by reason of his having been county attorney in the other. *Koenig v. State*, 35.

See JUDGMENTS, 1.

JUDGMENTS.

1. **THE FAILURE OF THE JUDGE TO SIGN A JUDGMENT** does not invalidate it, though the statute provides that he shall subscribe the records of his court. Such statute is directory only, and his omission to comply with it does not render the judgment inoperative or void. *Scott v. Rohman*, 767.
2. **JUDGMENTS OF UNITED STATES COURTS AS DOMESTIC JUDGMENTS.**—Courts of the United States within a particular state are not, in that state, regarded as foreign courts. Their judgments, in all respects, as to remedies are treated as domestic judgments. *First Nat. Bank v. Sloman*, 707.
3. **RES JUDICATA.—AN EQUITABLE DEFENSE NOT PLEADED** in an action at law does not become res judicata. Hence, a defendant sued on a promissory note and submitting to the recovery of judgment thereon is not precluded from maintaining a bill in equity on the theory that the note was purchased by his trustee out of trust funds at a discount, but in the name of the judgment creditor, and a court of equity may restrain the enforcement of the judgment, and compel the holder to accept payment out of the trust funds, and limit the amount to be paid to the sum actually paid out by the trustee. *Petrie v. Badenoch*, 503.
4. **RES JUDICATA — A PARTY CANNOT RELITIGATE MATTERS WHICH HE MIGHT HAVE INTERPOSED.**—If he fails to plead or prove a fact which he might have pleaded or proved, or makes any other mistake during the progress of the action, this, while the judgment remains in force, cannot limit its effect. *Freeman v. McAninch*, 79.
5. **RES JUDICATA, EVIDENCE TO DISPROVE.**—Where it appears from the record of a cause that a question has been presented and decided, extrinsic evidence is not admissible to limit the effect of the record by proving that the parties on the trial of the former action limited their controversy to certain specific property less than that which the record shows to have been in issue between them. Hence, where the record shows an action to recover the possession of land, and a verdict and judgment in favor of the plaintiff for the whole, parol evidence is not admissible to prove that the only question litigated was one of boundary, and that the title to a part of the tract recovered was not submitted for decision nor decided. *Freeman v. McAninch*, 79.
6. **COLLATERAL ATTACK.**—Although mere irregularities in the conduct of a proceeding do not subject the decree rendered therein to a collateral, or even under some circumstances to a direct, attack, yet when the allegations in the pleadings that are essential to the jurisdiction of the court are untrue, and if the truth had appeared upon the record it would have been the duty of the court to have dismissed the

suit for want of jurisdiction, the proceedings therein are subject to collateral attack. *Springer v. Shavender*, 791.

7. COLLATERAL ATTACK—ADMINISTRATION OF PROPERTY OF LIVING PERSON.—Although the children of a person, under a misapprehension of facts, admit an allegation in a proceeding for the sale of their ancestor's land by his administrator that he is dead, and submit to a decree for the sale of the land, yet they may impeach such decree in a collateral proceeding, and avoid the estoppel of title derived through it by showing that their ancestor was living at the date of the decree. *Springer v. Shavender*, 791.

8. AN ASSIGNMENT OF A JUDGMENT is not liable to be defeated by a subsequent garnishment of the judgment creditor. *Scott v. Rohman*, 767.

See **APPEAL**, 1; **ATTACHMENT**, 2; **CREDITOR'S SUIT**; **INTEREST**; **JOINT LIABILITY**.

JUDICIAL NOTICE.

See **EVIDENCE**, 7-9.

JUDICIAL SALES.

1. JUDICIAL SALES OF REAL ESTATE.—The rule of caveat emptor applies to one who purchases real estate at a judicial sale thereof. *Pope v. Benster*, 703.

2. THE RULE OF CAVEAT EMPTOR applies to judicial sales, and a conveyance made to a purchaser thereat has no greater effect and transmits no greater estate than a quitclaim deed from the judgment debtor. *Butler v. Fitzgerald*, 741.

See **PLEDGE**, 2.

JURISDICTION.

See **CRIMINAL LAW**.

JURY AND JURORS.

See **TRIAL**, 1-3.

LANDLORD AND TENANT.

1. CONDITION IN LEASE—PUBLIC POLICY.—A covenant in a lease that if the tenant shall become embarrassed, or make an assignment for the benefit of creditors, or be sold out at sheriff's sale, the rent for the balance of the term shall at once become due and payable, and shall be first paid out of the proceeds of such assignment or sale, is not against public policy. Under it the landlord is entitled to one year's rent in advance on the distribution of the proceeds of a sheriff's sale of the tenant's property. *Platt v. Johnson*, 877.

2. UNLAWFUL USE OF PREMISES BY A SUBTENANT is a breach, whether known to the lessee or not, of a condition in the lease not to make or suffer any waste or any improper, unlawful, or offensive use of the premises. *Miller v. Prescott*, 434.

3. ASSIGNEE OF LEASE BY VIRTUE OF INSOLVENCY PROCEEDINGS.—While there is no privity of contract between a lessor and an assignee of the term, there is a privity of estate rendering the assignee liable upon the covenants of the lease so long as he holds the term. This rule applies

to assignees in bankruptcy and insolvency, providing they take possession. *Bell v. American Protective League*, 481.

6. **AN ASSIGNEE OF A LEASE OR AN ASSIGNEE IN BANKRUPTCY** of the lessee may relieve himself from further responsibility by assigning the term to another, however irresponsible the latter may be. *Bell v. American Protective League*, 481.
5. **WAIVER OF FORFEITURE OF LEASE.**—The right to declare a forfeiture secured by covenant in a lease may be waived by parol. *Moss v. Loomis*, 194.
6. **A FORFEITURE IS NOT WAIVED BY THE ACCEPTANCE OF RENT ALREADY ACCRUED** under a receipt specifying that it is not to waive any breach of the covenants and conditions of the lease. *Miller v. Prescott*, 434.
7. **ESTOPPEL TO ENFORCE FORFEITURE.**—A landlord, who by his words and conduct causes his tenants to believe that he does not intend to enforce a forfeiture provided for in the lease, is estopped to avail himself of the forfeiture after his tenants have acted under such belief. *Moss v. Loomis*, 194.

See RECEIVERS.

LATERAL SUPPORT.

See DAMAGES, 9; REAL PROPERTY, 1-3.

LEASE.

See LANDLORD AND TENANT; SPECIFIC PERFORMANCE, 1; VENDOR AND PURCHASER, 4, 5.

LEGACY.

1. **REAL ESTATE WHEN BOUND FOR PAYMENT OF.**—The blending of the real and personal estate in the residuary clause in a will binds the real estate for the payment of legacies. *Sloan's Appeal*, 889.
2. **INTEREST ON.**—After legacies become due and payable they are matured obligations against the estate, and bear interest at the legal rate. *Sloan's Appeal*, 889.
3. **INTEREST ON.**—If the settlement of an estate is delayed by litigation, the pecuniary legatees are entitled to legal interest on their legacies, although the executor is unable to realize that much interest in income from the estate, and the residuary legatees cannot complain, as the estate is charged with the payment of debts and pecuniary legacies first, and not until this is done is the residue ascertained or the extent of their interest determinable. *Sloan's Appeal*, 889.

LEGISLATURE.

See BOARDS OF HEALTH; MUNICIPAL CORPORATIONS, 1; POLICE POWERS; TAXES.

LETTERS.

See EVIDENCE, 1.

LIBEL.

1. **DEFINITION.**—Any printed or written statement which falsely and maliciously charges another with the commission of a crime is libelous per se. *World Publishing Co. v. Mullen*, 737.

3. **EVIDENCE OF GENERAL REPORT** that plaintiff is guilty of the imputed offense, or of defendant's suspicions of his guilt, is not admissible in actions of libel or slander for the purpose of reducing damages. *Sickra v. Small*, 344.
3. **PUBLISHING WORDS ATTRIBUTED TO ANOTHER.**—A newspaper publishing a report as coming from another person is answerable therefor if such report is false and libelous. *World Publishing Co. v. Mullen*, 737.
4. **CONSTRUCTION OF WORDS.**—In determining whether the words of a publication are libelous, the court will not resort to any technical construction of the language used, but the court and the jury will read the words, as they would read them elsewhere, in their ordinary and popular sense. Courts no longer strain to find an innocent meaning for words prima facie defamatory, nor do they put a forced construction upon words which might fairly be deemed harmless. *World Publishing Co. v. Mullen*, 737.
5. **PLEADING.**—A complaint averring that defendant published a statement to the effect that plaintiff had brought two actions upon certain policies of insurance, that there were a number of suspicious circumstances at the time of the loss, and it was reported that the plaintiff had fired his building, and that, as a result of the investigation, the insurer had refused to pay the loss, and his agent says he has sufficient ground for contesting the loss, but refuses to state what facts are in his possession in regard to the plaintiff's complicity, discloses the publication of matter libelous per se, without the aid of colloquium or innuendo or any allegation of special damages. *World Publishing Co. v. Mullen*, 737.
6. **A CHARGE OF A CRIME TO BE LIBELOUS** need not be expressed in the technical language essential to a good indictment, if the obvious meaning of the words employed is to impute to a person the commission of a crime or to subject him to public ignominy or disgrace. *World Publishing Co. v. Mullen*, 737.
7. **DAMAGES** in actions of libel or slander are measured by the injury caused by the words published and not by the moral culpability of the writer or speaker. *Sickra v. Small*, 344.
8. **EVIDENCE IN MITIGATION OF DAMAGES.**—In actions of libel or slander the defendant may introduce evidence in mitigation of damages that plaintiff's general reputation as a man of moral worth is bad, and may also show that his general reputation is bad with respect to that feature of character covered by the defamation in question. *Sickra v. Small*, 344.

LICENSE.

See MUNICIPAL CORPORATIONS, 2-6, 11.

LIENS.

- LIEN UPON OPERA HOUSE FOR MATERIALS SUPPLIED FOR STAGE AND SCENIC OUTFIT.**—Scenery and other articles forming the stage and scenic outfit of an opera house are part and parcel of the edifice as such, being essential to the completeness of a building of that kind. Hence, one who furnishes such articles furnishes material for the improvement of real estate, and is entitled to a special lien therefor upon the opera house and premises, under a statute giving to persons furnishing mate-

rial for the improvement of real estate a special lien upon the real estate itself. *Waycross Opera House Co. v. Sossman*, 144.

See ATTACHMENT, 3, 4.

LIFE TENANTS.

See ADVERSE POSSESSION, 1.

LIMITATIONS OF ACTIONS.

FRAUD IN CONCEALING CAUSE OF ACTION.—In suits in equity seeking relief on the ground of fraud, if ignorance of the fraud has been produced by affirmative acts of the guilty party in concealing facts from the complainant, the statute of limitations will not bar relief if the suit was brought within the proper time after the discovery of the fraud. If the fraud is concealed, or is of such a character as to conceal itself, so that the party injured remains in ignorance without any fault or want of diligence on his part, the statute does not begin to run, though there are no special circumstances or efforts on the part of the persons committing the fraud to conceal it from the diligence of the other party. *Dorsey Machine Co. v. McCaffrey*, 290.

See CORPORATIONS, 10; PARTNERSHIP, 4; PLEADING, 5.

LIVERY-STABLE KEEPERS.

See BAILMENTS.

LIVESTOCK.

See CARRIERS, 2; INTERSTATE COMMERCE, 4, 5; RAILROADS, 9, 10; STATUTES, 5.

LUNATICS.

See INSANE PERSONS.

MANDAMUS.

RAILWAYS.—MANDAMUS WILL NOT ISSUE TO COMPEL the doing of an act which it appears that the person against whom the writ is sought is not able to do. Hence, it will not issue to compel a street railway to pave the street between its tracks when it has no means with which to do the work and no ability to borrow. *Benton Harbor v. St. Joseph etc. Ry. Co.*, 553.

MANSLAUGHTER.

See HOMICIDE, 2-6.

MARRIAGE AND DIVORCE.

1. **MARRIAGE—EVIDENCE.**—PRESUMPTION of marriage arising from cohabitation, repute, and declarations is rebutted by a subsequent actual marriage with another person, and the assumption of similar relations. *Hiler v. People*, 221.
2. **MARRIAGE LEGAL AT COMMON LAW** consists of a contract and consent *per verba de presenti*, or if made *per verba de futuro cum copula*, the *copula* is presumed to have been allowed on the faith of the marriage promise, and that the parties, at the time of the *copula*, accepted each other as husband and wife. *Hiler v. People*, 221.

3. **DIVORCE—DUTY OF FATHER TO SUPPORT CHILD AWARDED TO MOTHER.**—A decree of divorce granted to a wife, committing to her the care and custody of her minor child, entirely relieves the father from any legal obligation to support the child, except such as may be imposed upon him by the original or any subsequent decree in the divorce proceedings. *Hall v. Green*, 311.
4. **DIVORCE—DUTY OF FATHER TO SUPPORT CHILD.**—A wife who is granted a divorce and the custody and care of her minor child cannot maintain an independent action against the father for the support of the child thereafter, if the decree of divorce is silent as to any allowance for the support of such child. *Hall v. Green*, 311.

See BIGAMY, 2-8.

MARRIED WOMEN.

See HUSBAND AND WIFE; STATUTES, 1.

MASTER AND SERVANT.

1. **SELECTION OF SERVANTS—MASTER'S DUTY AND LIABILITY.**—A master owes to each of his servants the duty of using reasonable care and caution in the selection of competent fellow-servants, and in retaining only those who are. If he fails to perform this duty, and an injury is occasioned by the negligence of an incompetent or careless servant, the master is responsible to the injured employee, not for the mere negligent act or omission of the incompetent or careless servant, but for his own negligence in not discharging his own duty toward the injured servant. *Norfolk etc. R. R. Co. v. Hoover*, 392.
2. **INJURY TO FELLOW-SERVANT—WHAT NECESSARY TO MAKE MASTER LIABLE.**—If a servant sues his master for injuries resulting from the negligence of a fellow-servant, he must, to recover, prove that some negligence of the latter caused the injury, and that the master was negligent either in the selection of the fellow-servant or in retaining him. *Norfolk etc. R. R. Co. v. Hoover*, 392.
3. **INJURY TO FELLOW-SERVANT—CONCURRING NEGLIGENCE—INSTRUCTIONS.** To justify a recovery by a servant against a master for injuries received through the negligence of a fellow-servant, the negligence of the fellow-servant and the additional negligence of the master in employing that particular servant whose negligence caused the injury must concur; and instructions to the jury concerning the master's negligence in selecting the plaintiff's fellow-servants should clearly restrict it to the selection of the one who caused the injury. *Norfolk etc. R. R. Co. v. Hoover*, 392.
4. **CONTRIBUTORY NEGLIGENCE—SUDDEN PERIL.**—A servant, whether minor or adult, without fault on his part, suddenly placed in a position of peril by his employer, is not guilty of contributory negligence in failing to quickly decide and act upon the wisest course to escape the threatened danger. *Neilson v. Hillside Coal etc. Co.*, 886.
5. **MINOR EMPLOYEE—NEGLIGENCE—QUESTION FOR JURY.**—If a minor, who has not reached the age when capacity to see and appreciate danger is presumed, is employed to do one kind of work and then placed at another employment more dangerous in character, it is the duty of the employer to see that he receives such instruction as informs him of the danger surrounding him, to enable him as far as practicable

to avoid it. The failure to perform this duty renders the employer liable in case of injury to the servant. *Neilson v. Hillside Coal etc. Co.*, 886.

See RAILROADS, 17, 20-22; TELEGRAPH COMPANIES, 8.

MECHANIC'S LIEN.

1. A MECHANIC'S LIEN MAY BE ACQUIRED BY A CORPORATION, whether domestic or foreign, under a statute providing for a lien in favor of any person. *Chapman v. Brewer*, 779.
2. A CORPORATION, WHETHER FOREIGN OR DOMESTIC, MAY ACQUIRE AND ENFORCE A MECHANIC'S LIEN under a statute conferring the right to such lien upon any person. *Chapman v. Brewer*, 779.
3. A MECHANIC'S LIEN MAY BE VERIFIED by an agent of the corporation upon his information and belief. *Chapman v. Brewer*, 779.
4. A STATEMENT in a claim for a mechanic's lien need not disclose the dates of the performance of labor or furnishing material where it appears that such performance or furnishing was within the time required by law to entitle the claimant to a lien. It is sufficient to show when the last labor was done or the last material furnished. *Chapman v. Brewer*, 779.
5. MISTAKE, EVIDENCE TO CORRECT.—The statement in a claim for a mechanic's lien that the commencement to furnish material or perform labor was in December, when it was in fact in November, may, by parol evidence, be shown to be incorrect, and the lien to be made to relate to the true date of such commencement. *Chapman v. Brewer*, 779.
6. A MECHANIC'S LIEN IS NOT WAIVED by the fact that the person furnishing material has or reserves a vendor's lien thereon. *Chapman v. Brewer*, 779.
7. MECHANIC'S LIEN IS NOT WAIVED BY A STIPULATION in the agreement for the furnishing of material or the performing of labor that the person furnishing or performing it shall have a lien upon all fixtures, machinery, etc., and real estate where such machinery is placed, where there is nothing more definite in the contract as to the nature and extent of the lien thus contracted for. *Chapman v. Brewer*, 779.
8. THE TAKING OF A MORTGAGE ON THE SAME PROPERTY UPON WHICH THE CREDITOR CLAIMS A STATUTORY LIEN does not necessarily waive or displace the lien. The mortgage may be regarded as cumulative security. *Chapman v. Brewer*, 779.
9. A MECHANIC'S LIEN IS NOT WAIVED BY THE TAKING OF A NOTE AND MORTGAGE for the amount of the debt unless they are accepted in payment, or looked upon and treated by the parties as a waiver of the right to claim a lien, or it would be inequitable, as between the parties, to permit the holding of the additional security and also the enforcement of the lien. *Chapman v. Brewer*, 779.
10. THE VERIFICATION OF A CLAIM BY A PERSON who appears by his oath to be the book-keeper and treasurer, and a member of the company in whose behalf the claim is made, is made by the proper person. *Chapman v. Brewer*, 779.
11. EFFECT OF ABSOLUTE ASSIGNMENT OF CLAIM.—If one entitled to a mechanic's lien makes an absolute assignment of the sum due him, and not merely as security, a lien statement filed by him on his own ac-

count after such assignment, though within the statutory time, is void, and will not, therefore, inure to the benefit of his assignee. *Davis v. Crookston Water Works etc. Co.*, 622.

12. **EFFECT OF ASSIGNING CLAIM AS COLLATERAL SECURITY.**—Though one entitled to a mechanic's lien assigns the sum due him to another as collateral security for the payment of a debt, he still has sufficient interest to entitle him to file a lien statement afterward within the statutory time, which will secure his equitable rights in the claim assigned, and also inure to the benefit of his assignee. *Davis v. Crookston Water Works etc. Co.*, 622.

13. **MECHANIC'S LIEN AND MORTGAGE—CONFLICT BETWEEN.**—One taking a mortgage on realty is bound to know whether material has been furnished or labor performed in the erection, repair, or removal of improvements thereon, and the mortgage is subject to the lien for materials commenced to be furnished or labor commenced to be performed prior to its execution. *Chapman v. Brewer*, 779.

See EVIDENCE, 10.

MISREPRESENTATIONS.

See DAMAGES, 7, 8; ESTOPPEL, 1, 2; FRAUD; VENDOR AND PURCHASER, 3.

MISTAKE.

See DEEDS, 2-5; MECHANIC'S LIEN, 5.

MONOPOLIES.

1. **INCORPORATION** of an organization or combination to monopolize a business, and the transfer to it of the property of its members, do not purge it of its illegality. *Distilling etc. Co. v. People*, 200.
2. **CORPORATION CHARTER CANNOT AUTHORIZE.**—A charter authorizing a corporation to engage in a general distillery business, and to own the property necessary for that purpose, does not authorize it to form a trust and combination, and create a monopoly of such business. *Distilling etc. Co. v. People*, 200.
3. **COMBINATION OR TRUST** organized to control the manufacture and sale of all distillery products, and to thus dictate the amount to be manufactured and the selling price, is illegal and void. *Distilling etc. Co. v. People*, 200.

See CORPORATIONS, 3.

MORTGAGES.

1. **CONSIDERATION.**—A MORTGAGE GIVEN FOR THE PURPOSE OF PAYING A PRE-EXISTING INDEBTEDNESS is based upon a sufficient consideration, and protects the mortgagee to the same extent as if a new consideration had been given when the mortgage was executed. *Chaffee v. Atlas Lumber Co.*, 753.
2. **USURY—INTEREST ON FORECLOSURE.**—If a mortgage is given on land in one state to secure a loan payable in another, the law of the former state prevails in the settlement of interest upon foreclosure, provided the money loaned is used in that state. *Meroney v. Atlanta Building etc. Assn.*, 841.

See CORPORATIONS, 5; INSURANCE, 6, 7; MECHANIC'S LIEN, 8, 9, 13; RAILROADS, 7, 8.

MUNICIPAL CORPORATIONS.

1. **CONSTITUTIONAL LAW — EXCLUSIVE FRANCHISE BY MUNICIPALITY.**—A constitutional provision prohibiting the legislature from granting "any special or exclusive privileges, immunity, or franchise whatever," is not a restriction upon the power of the legislature over the subject involved, but is a limitation upon the manner of exercising such power, and does not prohibit a city of the metropolitan class from contracting for the removal therefrom of dead animals, garbage, and other noxious and unwholesome matter, though the privilege thereby conferred upon the contractor is exclusive. *Smiley v. MacDonald*, 684.
2. **LICENSE.**—AN ORDINANCE licensing or regulating a particular business or occupation will not be held void simply because it provides for a fund to be derived from license fees. *Littlefield v. State*, 697.
3. **EXERCISE OF POWER TO LICENSE OR REGULATE BUSINESS AS A SANITARY MEASURE.**—If authority is conferred upon a city to license and regulate a particular business or occupation as a sanitary measure, such power must be exercised in the interest of the public health or safety, and not as a means of raising revenue. *Littlefield v. State*, 697.
4. **ORDINANCE PROHIBITING SALE OF MILK WITHOUT A LICENSE WILL BE UPHOLD WHEN.**—A city ordinance prohibiting the sale, or keeping for sale, of milk without a license will be upheld by the courts if it is plainly intended as a police regulation, and the revenue derived from the license fee is not disproportionate to the cost of enforcing the ordinance and regulating the business, irrespective of how the city applies the fees realized. *Littlefield v. State*, 697.
5. **PRESUMPTION AS TO VALIDITY OF ORDINANCE PROHIBITING SALE OF MILK WITHOUT A LICENSE.**—If an ordinance prohibiting the sale, or keeping for sale, of milk without a license is clearly within the general powers of a city, it is presumed to be reasonable, and will not be declared void by the courts unless it is shown to be unreasonable. *Littlefield v. State*, 697.
6. **POWER TO LICENSE SALE OF MILK.**—The city of Omaha has power, under its charter, to license and regulate the sale of milk within its limits, and may lawfully exact a reasonable license fee from all persons engaged in the business. *Littlefield v. State*, 697.
7. **A MUNICIPAL ORDINANCE LIMITING THE PLACES WITHIN A CITY** in which it shall be lawful to inter deceased human beings is not void on its face. It is valid unless it unreasonably restricts the rights of its citizens to procure places for that purpose within such limits, and he who claims that it is unreasonable must assume the burden of proving it to be so. *Austin v. Austin City Cemetery Assn.*, 114.
8. **A POWER TO FORBID THE INTERMENT OF HUMAN BEINGS** within specified limits of the city is conferred upon the municipality by a charter authorizing it to regulate the burial of the dead and to purchase, establish, and regulate one or more cemeteries within or without the city limits. *Austin v. Austin City Cemetery Assn.*, 114.
9. **JURY TRIAL.**—If a municipal ordinance is claimed to be void because unreasonable, it is incumbent upon the party making that claim to establish it, and, if the facts are controverted, they must be determined by a jury. *Austin v. Austin City Cemetery Assn.*, 114.
10. **ACTION TO RECOVER DAMAGES FOR NONCOMPLIANCE WITH AN ORDINANCE.**—If an ordinance of a municipality is a governmental measure

which it might enact or not, no liability can arise against the city, or those appointed to carry out the ordinance, in favor of a person suffering from its nonenforcement. *Fitch v. Seymour Water Co.*, 258.

11. **REASONABLENESS OF LICENSE FEE EXACTED IS REVIEWABLE BY THE COURTS.**—The courts have power to inquire into the reasonableness of a fee exacted by a city in the exercise of its power to license or regulate any particular business or occupation, but they will give a wide latitude for the exercise of legislative discretion in the matter. *Littlefield v. State*, 697.
12. **CONSTITUTIONALITY OF ACT PROVIDING FOR SPECIAL ASSESSMENT.**—The provisions of an act providing for a special assessment on the property benefited by a change of street grade are not unconstitutional because they do not give the owners of such property a right to be heard as to who shall be appointed assessors, or a right to appeal from such appointment. *Kelly v. Minneapolis*, 605.
13. **DIVERSION OF SURFACE WATER.**—Under constitutional provision providing that private property shall not be taken or "damaged" without compensation being first paid, a municipal corporation which, in the exercise of a statutory power authorizing it to erect and maintain waterworks interrupts the natural flow of surface water, and causes it to flow in increased quantity upon a lower lot-owner's land, thereby diminishing its market value, must make compensation for the damage occasioned by the increased flow. *Mayor v. Sikes*, 132.
14. **DAMAGES FOR CHANGE OF STREET GRADE.**—If a city, after a railroad right of way has been acquired over a street, changes its grade, so as to make it cross over the railroad tracks on a bridge, with approaches, instead of crossing such tracks on a grade crossing, the railroad company is under no obligation to pay damages to the owners of permanent buildings abutting on such approaches caused by such change of grade. The statute creating liability for such damages imposes it on the property benefited by such change of grade. *Kelly v. Minneapolis*, 605.
15. **RECONSIDERATION OF VOTE ORDERING CHANGE OF STREET GRADE.**—The provisions of a city charter giving the city council a right, after all claims for damages caused by changing the grade of a street are filed, to reconsider the vote ordering such change, is a privilege to be exercised by the council, and the owners of the property to be taxed to pay such damages cannot claim that the special assessment upon their property is void because the city council had put itself in a position where it had no opportunity to reconsider its vote when the time to file claims for damages had expired. *Kelly v. Minneapolis*, 605.
16. **DAMAGES FOR CHANGE OF STREET GRADE—EFFECT OF CITY'S ASSUMING LIABILITY.**—While a city may, by contract with a railroad company having a right of way over one of its streets, assume all liability, as between itself and the company, for damages caused to the owners of property by changing the grade of a street, this will not relieve the property benefited from the statutory liability for such damages, especially where the company was never liable. *Kelly v. Minneapolis*, 605.
17. **DUTY TO KEEP STREETS IN REPAIR.**—The law imposes upon municipal authorities the imperative duty of keeping in proper repair the streets and bridges of the town. *Russell v. Town of Monroe*, 322.

18. **LIABILITY FOR DEFECT IN STREET.**—To render a city liable for personal injuries caused by an obstruction in the street, it must appear that such obstruction was the sole cause of the injury. *Cleveland v. Bangor*, 326.
19. **LIABILITY FOR INJURIES DUE TO DEFECTIVE SIDEWALKS.**—A municipal corporation is liable for an injury caused by an unsafe sidewalk, the condition of which is due to the plan adopted for its construction, where the city could have remedied the defect, but did not do so. *Blyhl v. Waterville*, 596.
20. **DEFECTS IN STREET—NEGLIGENCE—PROXIMATE CAUSE.**—Contributory negligence to bar recovery against a city for an injury received from a defective highway must be one of the efficient and proximate causes of the accident, and not a mere condition or occasion of it. *Cleveland v. Bangor*, 326.
21. **DEFECTS IN STREETS—PROXIMATE CAUSE OF ACCIDENT.**—Whether the fright of a horse at an electric car is to be deemed the proximate cause of an accident arising from an obstruction in the street, or only a circumstance which permitted it to happen, must depend upon the character and conduct of the horse. If he was not reasonably gentle and safe, and became entirely unmanageable from fright, thus causing the accident, the fright of the horse is the proximate cause of the accident, and the city is not liable therefor. If the horse was reasonably safe and suitable, and, while being properly driven, started and shied at the sudden appearance of the car, swerving but a few feet from the line of travel, and through only a momentary loss of control by the driver brought the vehicle in contact with the obstruction in the street, such obstruction, and not the horse, was the proximate cause of the accident, and the city is liable. *Cleveland v. Bangor*, 326.
22. **DUTY TO KEEP STREETS IN REPAIR.**—A person walking upon a sidewalk has a right to expect and to act on the assumption that the municipal authorities have properly discharged their duty by keeping the streets in good repair; and the only exception to this rule is, that persons must take notice of such structures as the necessities of commerce or the convenient occupation of dwelling-houses may require. *Russell v. Town of Monroe*, 823.
23. **Municipal authorities of a town are negligent in leaving open a ditch where it crosses a sidewalk, for a sufficient space to admit the body of a person walking upon such highway.** *Russell v. Town of Monroe*, 823.
24. **STREETS AND SIDEWALKS.**—It is the positive duty of a municipal corporation having exclusive control of its streets and sidewalks, and having the means within its power, to keep them in reasonably safe condition. *Blyhl v. Waterville*, 596.
25. **NEGLIGENCE.—PREVIOUS KNOWLEDGE BY A PERSON INJURED** of the existence of a defect in a sidewalk does not per se establish negligence on his part. *Russell v. Town of Monroe*, 823.
26. **NEGLIGENCE—BURDEN OF PROOF.**—In an action against a city to recover for a personal injury caused by a defect in a sidewalk the burden of proof is on the city to show contributory negligence, and a failure to exercise reasonable or ordinary care on the part of the party injured. *Russell v. Town of Monroe*, 823.

See WATER COMPANIES.

NAVIGATION.

See **WATERS**, 1-3.

NEGLIGENCE.

1. **NEGLIGENCE OF DRIVER, WHEN NOT IMPUTABLE TO ONE RIDING.** — The negligence of an able and competent driver of a private carriage, drawn by a quiet horse, and at whose invitation one is taking a gratuitous ride, is not imputable to the person so riding where he has no control of the driver or of the horse and carriage. Hence, if the carriage collides with a railroad train, and the person accepting the ride is killed, contributory negligence of the driver is no defense to an action for damages against the railroad company for causing such death. *Baltimore etc. R. R. Co. v. State*, 415.
 2. **EXERCISE OF CARE.** — If a defendant has by carelessness left the plaintiff exposed to peril as a natural consequence of its conduct, the failure of the plaintiff to exercise unusual caution to avoid an ensuing danger is not deemed the proximate cause of the injury. The plaintiff is not bound to exercise more than ordinary care because he might possibly, before or at the time of sustaining the injury, have thereby discovered that defendant had carelessly left him exposed to danger. *Russell v. Town of Monroe*, 823.
 3. **CONTRIBUTORY NEGLIGENCE IS WANT OF ORDINARY CARE** on the part of a party injured, and a proximate connection between that and the injury. If such party acts with ordinary prudence, in view of surrounding circumstances suggestive of danger, there is no contributory negligence. *Russell v. Town of Monroe*, 823.
 4. **CONTRIBUTORY.** — THE NEGLIGENCE OF THE DRIVER OF A STREET CAR IS NOT IMPUTABLE to a passenger therein. *Gulf etc. Ry. Co. v. Pendry*, 125.
 5. **DUTY TO GUARD AGAINST DANGER.** — A person is not negligent in failing to provide against a danger that could not have been reasonably expected, much less against a danger that he is warranted in assuming does not exist. *Russell v. Town of Monroe*, 823.
 6. **NEGLIGENCE OF CHILD CONTRIBUTING TO HIS INJURY.** — If a child between nine and ten years of age, of average intelligence, walks backward upon a public street a distance of twenty-five or thirty feet until he falls into a manhole, left open and unguarded, he is not in the exercise of due care, and having adopted a dangerous method of crossing the street, cannot recover for an injury which was the natural consequence of his recklessness. *Casey v. Malden*, 473.
- See **INSURANCE**, 25; **MASTER AND SERVANT**; **MUNICIPAL CORPORATIONS**, 20-26; **RAILROADS**, 9, 10, 14-16, 20, 22, 31; **TELEGRAPH COMPANIES**, 3.

NEGOTIABLE INSTRUMENTS.

1. **CONTRACT—CONSIDERATION THAT THE PROMISEE WILL PERFORM HIS EXISTING OBLIGATION.** — When one who is unwilling or hesitating to go on and perform a contract, which proves a hard one for him, is requested to do so by a third person who is interested in the performance, though having no legal way to compel it or to recover damages for a breach, and who accordingly makes an independent promise to pay a sum of money for such performance, such promise is not without consideration, and may be enforced. Therefore, if a person who has made an accommoda-

tion note which has been discounted at a bank, in consideration that he will pay such note, receives a note for a like amount from a director of the bank interested in having such payment made, the note so given by the director is not without consideration, and will support an action. *Abbott v. Doane*, 465.

2. **EFFECT OF BLANK INDORSEMENT BEFORE DELIVERY.**—The legal effect of a blank indorsement written on the back of a promissory note, before delivery by one not a party to the note, is to make him an absolute maker or promisor. He is an absolute surety on the note, and not a conditional one. *Dennis v. Jackson*, 603.
3. **INDORSEMENT CANNOT BE VARIED BY PAROL EVIDENCE.**—The legal effect of a blank indorsement written on a promissory note, before delivery, by one not a party to the note, for the purpose of giving it credit, cannot be varied by proof of a parol agreement made at the same time, that he was to be charged as indorser, and not as maker, though he was indorser of a prior note for which the other was substituted. *Dennis v. Jackson*, 603.
4. **CONFLICT OF LAWS—DAMAGES ON PROTESTED NOTE.**—If a note secured by mortgage on lands in one state is made and is payable in another, it is governed by the law of that state allowing damages upon protested notes. *Guignon v. Union Trust Co.*, 186.
5. **ACCOMMODATION PAPER.**—NOTICE to a bank discounting accommodation paper, that the indorser is lending his credit to the maker does not affect the bank or relieve the indorser. *Philler v. Patterson*, 896.
6. **ACCOMMODATION PAPER.**—A person for whose accommodation a note is given may use it in any way to accommodate himself, and after he has so used it the maker or indorser is bound by his action, and becomes liable for the amount of the note according to its terms, and cannot defend against the indorsee or holder on the ground that the note is without consideration. *Philler v. Patterson*, 896.
7. **ACCOMMODATION PAPER—DEFENSES.**—As against a holder for value an accommodation maker of a note can defend only on the ground of actual payment. The fact that it is made for accommodation, and without consideration, is immaterial. *Philler v. Patterson*, 896.
8. **TITLE OF BONA FIDE HOLDER WITHOUT NOTICE.**—The title of a bona fide holder of a negotiable instrument without notice of any facts which would invalidate the title of the indorser from whom the holder obtained it, is good, and will be protected. *Ditch v. Western Nat. Bank*, 375.
9. **ALTERATION.**—A note altered after execution by the apparent interlineation on its face of the words "with interest at six per cent" without the knowledge or consent of the maker is void, and an innocent purchaser for value cannot recover the principal on the note as originally given by waiving any claim for interest. *Gettysburg Nat. Bank v. Chiselm*, 929.

See PLEDGE.

NEW TRIAL.

EXCESSIVE VERDICT—CONFLICTING EVIDENCE.—If a verdict ought not to be sustained because it is excessive, a new trial should be granted unconditionally where the evidence was so conflicting as not to warrant any fixed and absolute conclusions upon the questions involved. It

is error to make it conditional upon reducing the amount. *Mayer v. Silber*, 132.

NOTICE.

See VENDOR AND PURCHASER, 4, 5.

NUISANCE.

PLEADING—WHAT IS SPECIAL DAMAGE NOT COMMON TO GENERAL PUBLIC.—A complaint asking damages for a public nuisance states a cause of action and sufficiently shows that the plaintiff has sustained special damage not common to the general public where it appears that his lot fronted on a street as well as on a public alley running through the block from street to street that the defendant wrongfully obstructed the alley by erecting a building across one end of it; that it was too narrow to permit teams drawing vehicles to enter at the other end and turn around in it, and that, for this reason, access was largely cut off from the rear of plaintiff's lot on which he resided. *Kays v. Chicago etc. Ry. Co.*, 627.

See WATERS, 3.

OFFICERS.

See CORPORATIONS, 17-19; EVIDENCE, 6.

ORDINANCES.

See INJUNCTIONS, 1, 2; MUNICIPAL CORPORATIONS, 2-10.

PARDONS.

1. **CONSTITUTIONAL LAW.**—The power to pardon criminals given by the state constitution cannot be restricted or its operation limited by statute. *Diehl v. Rodgers*, 908.
2. **RESTORATION TO CIVIL RIGHTS.**—A pardon generally removes the future consequences of the criminal act as completely as if it had never been committed, and restores the offender to all of his civil rights. *Diehl v. Rodgers*, 908.

See WILLS, 3; WITNESSES, 2.

PARENT AND CHILD.

See DAMAGES, 2; MARRIAGE AND DIVORCE, 3; PLEADING, 2.

PARTNERSHIP.

1. **HOLDING OUT—RIGHTS OF CREDITORS.**—As between the partnership creditors and the individual creditors of an alleged partner of an alleged partnership having no actual existence in fact, although the parties thereto have held themselves out to the world as partners, there is no equity to support the claim of execution partnership creditors as against prior execution creditors of the individual partner who is the owner of the assets. *Bisler v. Kresge*, 920.
2. **MINORITY OF ALLEGED PARTNER—HOLDING OUT—RIGHTS OF CREDITORS.**—If a minor employed at a salary, and contributing no property to the business, is held out to the world as a partner, and, after becoming of age, repudiates his obligation on joint notes given by himself and his alleged partner, he has no equity which entitles the

partnership creditors to a preference over the individual creditors of the partner who owns all of the assets of the alleged partnership. *Bisler v. Kresge*, 920.

3. **COMPLAINT AND JUDGMENT AGAINST INDIVIDUAL PARTNERS.**—A complaint against defendants, designated by their individual names, and as partners doing business under a given firm name, is not against the firm named, but will support a personal judgment against the individual defendants therein named. *First Nat. Bank v. Sloman*, 707.
4. **EFFECT OF PARTIAL PAYMENT BY ONE PARTNER AFTER DISSOLUTION OF FIRM.**—A partial payment of a partnership debt, made by one of the firm after dissolution, will prevent the bar of the statute of limitations as to the other partners, in favor of a creditor who has had dealings with the firm and no notice of its dissolution. *Davison v. Sherburne*, 618.
5. **STATUS OF PARTNERS AFTER DISSOLUTION.**—A firm, even after dissolution, are still partners as to those with whom they have previously dealt as partners, and who have no notice or knowledge of the dissolution, and may bind each other in matters within the scope of the partnership business. *Davison v. Sherburne*, 618.

See **INSOLVENCY**, 2; **INSURANCE**, 16, 17.

PATENTS.

1. **TRADEMARKS—PATENTED ARTICLES.**—One who has obtained the protection afforded by a patent must yield up his monopoly with all that belongs to it at the end of the term. The right to the exclusive use of the name given to his goods, which may have otherwise become a trademark, will ordinarily fall with the patent itself. *Dover Stamping Co. v. Fellows*, 448.
2. **TRADEMARKS.**—WHEN THE MANUFACTURER OF A PATENTED ARTICLE CALLS IT BY A NAME by which and by no other name it becomes known to the trade, the right to the exclusive use of that name ceases with the expiration of the patent. Therefore, if a particular patented eggbeater is known by the name of "Dover," and the patent expires, any person may make an eggbeater of the same character and call it by the same name, unless he also does something to indicate that it is made by some other person. *Dover Stamping Co. v. Fellows*, 448.
3. **TRADEMARK OR NAME.**—ONE MAY COPY WITH EXACTNESS WHAT ANOTHER HAS PRODUCED without inflicting legal injury, unless he attributes to what he has made a false origin by claiming it to be the manufacture of some other person. Hence, when a patent expires, any person may make the article in the same form in which it was made by the patentee, and put it on the market for sale, and his so doing is not an invasion of a trademark or name, though he also calls the article by the name by which it was known when its manufacture and sale were protected by patent. *Dover Stamping Co. v. Fellows*, 448.

PAYMENT.

See **APPEAL**, 1; **CHECKS**, 1.

PENALTY.

See **TELEGRAPH COMPANIES**, 9-11; **USURY**, 2.

PERSONAL EXAMINATION.See **ARREST.****PHYSICIANS AND SURGEONS.**See **WILLS, 26.****PLEADING.**

1. **ANIMALS—PLEADING TO RECOVER DAMAGES FOR DEATH CAUSED BY GLANDERS.**—If damages are claimed against the fraudulent vendor of a horse affected with glanders, for the death of a person contracting the disease by coming in contact with the horse, the declaration must, in effect, allege that getting the disease would be the natural and probable consequence of coming in contact with it. An allegation that the disease "may easily be communicated to human beings" is not sufficient. *State v. Fox, 424.*
 2. **A COMPLAINT FOR GOODS SOLD AND DELIVERED** does not state facts sufficient to constitute a cause of action if it merely alleges that the defendant is indebted to the plaintiff in a sum named upon an account for goods sold and delivered to him at his request, and omits to state that the goods were sold by the plaintiff to the defendant. *Pioneer Fuel Co. v. Hager, 574.*
 3. **A COMPLAINT IN AN ACTION TO RECOVER FOR THE DEATH OF THE PLAINTIFF'S MOTHER,** alleging that she, during her lifetime, aided in their support and cared for them in their sickness, and that her home was their home, and that they had every reasonable expectation that had she lived she would have continued to aid and assist in their support and maintenance, and that by her death they have been deprived of her motherly care, assistance, support, and maintenance, to their damage in a sum specified, is not subject to objection on the ground that it is vague and indefinite. *San Antonio etc. Ry. Co. v. Long, 87.*
 4. **ADMISSION OF FACT OF INCORPORATION.**—If the incorporation of the defendant averred in the declaration is not denied by the plea, that fact must be taken as admitted. *Norfolk etc. R. R. Co. v. Hoover, 392.*
 5. **STATUTES OF LIMITATION—DEMURRER.**—If there are exceptions to the period limited by statute in any case, and the complaint shows upon its face that the action was not brought within the time limited, still the question cannot be raised by demurrer to the complaint, unless it also shows that the particular action is not within any of the exceptions to the statute. *Dorsey Machine Co. v. McCaffrey, 290.*
- See **INSURANCE, 27; LIBEL, 5, 6; NUISANCE; PARTNERSHIP, 3; QUO WARRANTO.**

PLEDGE.

1. **COMMERCIAL PAPER PLEDGED AS COLLATERAL CANNOT BE SOLD** at either public or private sale, without an express agreement to that effect. *Oleghorn v. Minnesota Title Ins. etc. Co., 615.*
2. **JUDICIAL SALE OF.**—A court of equity may, under special circumstances, order a judicial sale of commercial paper pledged as collateral. Thus, if the pledgor of a note having four years to run becomes insolvent, makes an assignment for the benefit of creditors, and the pledgee proves his claim in the insolvency proceedings, there should be a judi-

cial sale of the note, so that the estate of the insolvent may be settled without waiting for the note to mature. *Oglehorn v. Minnesota Trust Ins. etc. Co.*, 615.

POLICE POWER.

1. The use of private property for a private purpose, not deleterious to public health or welfare, so as to come within proper police regulation, may be enjoyed free from legislative control. *Briggs v. Hutton*, 318.
2. RESTRICTION UPON REGULATIONS.—The legislature cannot, under the guise of police regulations, arbitrarily invade personal rights and private property, but it should appear to the court, when such regulations are called in question, that they have, in fact, some relation to the public health or public welfare, and that such is the end sought to be attained thereby. *Smiley v. MacDonald*, 684.

POWERS.

See TRUSTS, 2; WILLS, 9.

PREFERENCES.

See CORPORATIONS, 14, 16-19; DEBTOR AND CREDITOR; EXERCISES, 4.

PREMIUMS.

See INSURANCE 1, 21, 22.

PRESENTMENT.

See CHECKS, 4-10.

PRESUMPTIONS.

See CHATTEL MORTGAGES, 3, 4; EVIDENCE, 5, 6; MARRIAGE AND DIVORCE, 1; RAILROADS, 9, 14, 15; WITNESSES, 7.

PRINCIPAL AND SURETY.

See SURETYSHIP.

PROBATE.

See EQUITY; WILLS, 10-17.

PROCESS.

1. ACTS DONE UNDER ERRONEOUS OR VOIDABLE PROCESS ARE BINDING, and cannot be successfully assailed except by a direct proceeding. *Hague v. Corbit*, 232.
2. COLLATERAL ATTACK.—Acts done under voidable process cannot be attacked by a stranger thereto in a collateral proceeding. *Hague v. Corbit*, 232.
3. RETURN—DATE OF.—The return of an officer to process is not simply his indorsement thereon, but is the actual placing it in the office from which it issued, and the file mark of the clerk indicates the date of the return. *Hague v. Corbit*, 232.

See WITNESSES, 2.

PROOFS OF LOSS.

See INSURANCE, 6, 10.

PROTEST.

See NEGOTIABLE INSTRUMENTS, 4.

PROXIMATE CAUSE.

See MUNICIPAL CORPORATIONS, 20, 21.

PUBLIC POLIOY.

See EMBEZZLEMENT.

QUALIFICATIONS.

See JUDGES.

QUARANTINE.

See BOARDS OF HEALTH.

QUO WARRANTO.

1. **CORPORATIONS.**—AN INFORMATION IN QUO WARRANTO against a corporation, setting out its charter, and the proceedings which resulted in its incorporation, in express terms, admits the purposes of its organization and the scope of its corporate powers. *Distilling etc. Co. v. People*, 200.
2. **SUFFICIENCY OF THE INFORMATION** in quo warranto in point of substance to sustain the judgment may be reached either by demurrer, motion in arrest of judgment, or by error, and may be considered on appeal, though not challenged by demurrer. *Distilling etc. Co. v. People*, 200.
3. **FORM OF PLEADINGS.**—An information in the nature of quo warranto is a civil remedy. The pleadings must conform, as far as possible, to the general principles governing ordinary civil actions. *Distilling etc. Co. v. People*, 200.
4. **JOINDER OF PLEAS OF JUSTIFICATION AND DISCLAIMER** is repugnant and inconsistent, and subject to demurrer in a quo warranto proceeding. *Distilling etc. Co. v. People*, 200.
5. **IN QUO WARRANTO DEFENDANT MUST EITHER DISCLAIM OR JUSTIFY.** If he justifies he must set out his title specially. *Distilling etc. Co. v. People*, 200.
6. **DEMURRER TO PLEAS MAY REACH DEFECTS** in the information in quo warranto proceedings. *Distilling etc. Co. v. People*, 200.

See CORPORATIONS, 6.

RAILROADS.

1. **RIGHT OF WAY—RIGHT TO DEFINE BOUNDARY.**—A railroad company is not bound to take the entire width of land for its right of way, but may define the limits thereof, so as to exclude whatever is not necessary to the construction and operation of its road. While the proper time to make this definition is when the appropriation is made, it may exercise the right afterward within a reasonable time. *Jones v. Erie etc. R. R. Co.*, 916.
2. **GRANT OF USE OF HIGHWAY.**—In the absence of a clearly expressed intention to the contrary, a grant to a railroad company of the right to enter, cross, or pass along a public highway or street is a grant subject to the existing public right of use, and is to be exercised in such manner as shall interfere as little as possible with such use. *Jones v. Erie etc. R. R. Co.*, 916.

2. **RIGHT OF WAY.—THE PRESUMPTION** that a railroad company takes when it enters under the right of eminent domain, the full breadth of land allowed by law for its right of way, is applicable only when the entry is adverse and upon property subject to seizure or appropriation under general laws. It does not apply to an entry upon a public street, whether made under authority of the statute incorporating the company or by virtue of municipal consent. *Jones v. Erie etc. R. R. Co.*, 916.
4. **GRANT OF PERMISSION TO CROSS STREET—OCCUPATION OF SPACE.—**A grant of permission to a railroad company to cross the intersection of streets by an overhead structure, without designating the space to be occupied, authorizes the use of so much space as is necessary for the purpose of making the passage, and no more. The power of the company under the grant is exhausted by the building of the overhead structure that is authorized, and no more space can be occupied without a new application and a new grant from the city. *Jones v. Erie etc. R. R. Co.*, 916.
5. **RIGHT OF WAY—RELEASE.—**A railroad company may, within a reasonable time, withdraw from and release to the owner all or such part of its located right of way as is not necessary to the construction, maintenance, and operation of its road. When this is done the owner has no claim against the company for the land so released. *Jones v. Erie etc. R. R. Co.*, 916.
6. **EMINENT DOMAIN—TAKING PROPERTY ALREADY DEVOTED TO A PUBLIC USE.—**A street may be extended transversely across the right of way of a railway when in doing so the uses for which the right of way is employed are not materially injured, and where such uses and those of a street may coexist without impairment of the first use; but where such uses cannot so exist, or where the first use is destroyed or materially impaired, the second public use will be denied. *Cincinnati etc. Ry. Co. v. Anderson*, 285.
7. **JURISDICTION TO FORECLOSE MORTGAGE OF LINE IN TWO STATES, AND TO SELL ITS PROPERTY.—**If a railroad, forming a continuous line, and located partly in this state and partly in an adjoining state, is mortgaged by a corporation, whether de facto or de jure, of which the courts of this state have jurisdiction, the mortgage consisting of a trust deed made to secure bonds issued by the corporation, a court of this state having jurisdiction over the corporation may, in the exercise of its equitable powers, make a decree foreclosing the mortgage, and enforce it by directing a sale of the entire railroad and the assets of the company in both states, and the execution of a proper conveyance to the purchaser by the receiver, the trustee, and the mortgagor. *Georgia Southern etc. R. R. Co. v. Mercantile Trust etc. Co.*, 153.
8. **CONSOLIDATION AND MORTGAGE OF LINE IN TWO STATES—JURISDICTION IN FORECLOSURE PROCEEDINGS—EVIDENCE.—**If a railroad company incorporated under the laws of another state is consolidated with a railroad company of this state, whether a corporation de facto or de jure, and this consolidated company executes a mortgage upon its corporate property situated in both states, and is really the party before the court as the mortgagor in foreclosure proceedings, the jurisdiction of the court over the consolidated company is the same as it would be over a corporation of this state, and the truth of the case as to the real mortgagor is admissible in evidence. *Georgia Southern etc. R. R. Co. v. Mercantile Trust etc. Co.*, 153.

9. **CARRIERS OF LIVESTOCK—NEGLIGENCE—PRESUMPTION.**—Although the rule that injury to the contents of a car raises a presumption of negligence in transportation without direct evidence of accident or improper handling of cars applies, with proper limitations, to livestock, yet it does not apply to injury such as animals voluntarily inflict upon each other, or which can be accounted for, or satisfactorily explained on some ground other than negligent management of the train, nor does it apply in case of death from natural or unknown causes. *Schaffer v. Philadelphia etc. R. R.*, 884.
10. **NEGLIGENCE—"TEXAS FEVER."**—A railroad company negligently permitting Texas cattle to escape from its custody while in transportation is liable in damages for the loss of native cattle thereby infected with "Texas fever." *Grimes v. Eddy*, 653.
11. **ADDITIONAL CHARGE WHEN TICKETS ARE NOT PURCHASED AT STATION.** Railway corporations cannot exact as a penalty for not purchasing a ticket before entering the cars an additional charge, which, when added to the regular rate, will make the sum exacted exceed the maximum charge allowed by law. *Zagelmeyer v. Cincinnati etc. R. R. Co.*, 514.
12. **RAILWAY CORPORATIONS CANNOT CHARGE FOR A FRACTION OF A MILE** unless it is so large a fraction as to make the charge of one cent or more not in excess of three cents per mile permitted by law. *Zagelmeyer v. Cincinnati etc. R. R. Co.*, 514.
13. **MEASURE OF DAMAGES FOR BEING EJECTED FROM A CAR.**—A passenger ejected from a railway car because he will not pay a sum in excess of that the corporation is allowed to charge is entitled to substantial damages, though he might have avoided such ejection by paying the unlawful exaction, amounting to only ten cents. *Zagelmeyer v. Cincinnati etc. R. R. Co.*, 514.
14. **NEGLIGENCE, PRESUMPTION OF.**—WHEN AN ACCIDENT HAPPENS ON A railway train from which a passenger sustains injury by the breaking down of the carriage, or by the running off of the train, or by the spreading of the rails, the very nature of the occurrence is prima facie evidence of the negligence of the company and its servants. *Mexican Cent. Ry. Co. v. Lauricella*, 103.
15. **EVIDENCE—BURDEN OF PROOF OF NEGLIGENCE.**—Though from the derailment of a railway train and the injury of the plaintiff riding thereon as a passenger a presumption of negligence arises, it is not proper to instruct the jury that it devolves upon the plaintiff to establish by evidence of a preponderating weight that the accident was not the result of negligence. The burden of proof is not upon the defendant, and therefore if the evidence upon the issue of negligence does not preponderate on either side, the defendant is entitled to a verdict. *Mexican Cent. Ry. Co. v. Lauricella*, 103.
16. **NEGLIGENCE.**—Where it appeared that a railway train ran over a bull upon the track, and that he was left in a crippled condition so close to the track that he floundered upon it and caused the derailment of another train, or, though not crippled, he was left near the track, and no lookout was kept, as a consequence of which a later train again collided with him, in either event negligence is shown on the part of the railway corporation and its servants, entitling a passenger to recover for injuries received in the second accident. *Mexican Cent. Ry. Co. v. Lauricella*, 103.

- 17. MASTER AND SERVANT—LIABILITY FOR ACTS DONE WITHOUT SCOPE OF SERVANT'S EMPLOYMENT.**—A master is not liable for the acts of his servant done without the scope of the latter's employment. Hence, assuming that a brakeman has authority to keep trespassers off of a railroad train, there is no presumption that he is acting within the scope of his authority in throwing a stone at a boy, with a view of injuring him, after the latter has desisted from an attempt to swing or climb upon the train; and if the stone misses the boy, but hits another child, the railroad company is not liable for the injury thus done to the third person. *Georgia R. R. etc. Co. v. Wood*, 146.
- 18. EVIDENCE—DECLARATIONS AS ADMISSIONS OR PART OF RES GESTA.**—Declarations by a train conductor as to his motives of hostility in ejecting a passenger, made to another passenger eight or ten minutes after the ejection, are not admissible against the railway company, either as an admission or as part of the res gesta. *Barber v. St. Louis etc. R. R. Co.*, 646.
- 19. EVIDENCE—DECLARATIONS.**—A railway company is not bound by declarations made by its train conductor as to his motives which do not accompany or form part of some act or transaction within the apparent line of service for which he is employed. *Barber v. St. Louis etc. R. R. Co.*, 646.
- 20. MASTER AND SERVANT—FELLOW-SERVANTS, WHO ARE—RECOVERY FOR ACT OF INCOMPETENT FELLOW-SERVANT.**—Persons engaged in the same common work, employed by the same agent of the common master, and performing duties pertaining to the same general business, are fellow-servants. Hence, a brakeman, engineers, and firemen, and a train dispatcher, employed by the division superintendent of a railroad, and being under his instructions, are fellow-servants; and, if the negligence of the train dispatcher in sending out a drunken brakeman causes injury to an engineer, the latter cannot recover until he shows that there was negligence in the selection of the train dispatcher. *Norfolk etc. R. R. Co. v. Hoover*, 392.
- 21. MASTER AND SERVANT—NEGLIGENCE IN SELECTION OF SERVANT, HOW SHOWN.**—A failure to use due care in selecting careful servants may be fixed upon the master by showing such notorious or general reputation respecting the servant's unfitness or incompetency as that the master could not, without negligence on his part, have been ignorant of it when he employed the servant. Hence, a railroad company's negligence in employing a drunken brakeman whereby an engineer was injured may be shown by proof of the brakeman's general reputation for intemperance for one or two years before the accident and following it. *Norfolk etc. R. R. Co. v. Hoover*, 392.
- 22. MASTER AND SERVANT—NEGLIGENCE IN SELECTION OF SERVANT—EVIDENCE OF SERVANT'S GENERAL REPUTATION FOR INTemperance.**—Upon the question of a railroad company's negligence in employing and retaining a drunken brakeman, whereby an engineer was injured, it is competent to show that the general reputation of the brakeman for intemperance was of such a notorious character that the jury might well infer that it was known to the company, or that it was negligent in not making proper inquiry. *Norfolk etc. R. R. Co. v. Hoover*, 392.
- 23. RIGHT OF CROSSING.**—A STREET RAILWAY HAS THE RIGHT to cross over the tracks of a steam railway in a public street, subject to no conditions other than those to which the general public is subject in

traveling over such streets. Whatever right the steam railway has in the streets is subject to the burden and easement of the public generally, and the street railway, being entitled to the use of that easement, the steam railway's rights are subject to the right of the street railway to use the street. *Chicago etc. Ry. Co. v. Whiting etc. Ry. Co.*, 264.

24. **STREETS.—A STREET RAILWAY IS NOT AN ADDITIONAL BURDEN** to that of the general easement in the street, and the owners of the fee are not entitled to damages on account of the construction thereof in the public street. *Chicago etc. Ry. Co. v. Whiting etc. Ry. Co.*, 264.
25. **STREET RAILWAYS—NEGLIGENCE AT CROSSING—DUTY TO LOOK AND LISTEN.**—A person about to cross the tracks of a street railway operated by steam, cable, or electricity is bound to "look and listen." A failure to observe this rule is negligence per se. *Omelaer v. Pittsburg etc. Traction Co.*, 901.
26. **STREET RAILWAYS—NEGLIGENCE AT CROSSING—DUTY TO STOP, LOOK, AND LISTEN.**—A person about to cross the tracks of an electric street railway who cannot see an approaching car because of obstructions in the street not caused by the railway company, and who cannot hear the car because of the noise made by a wagon moving in front of him, is bound to "stop, look, and listen" before attempting to cross the tracks. A failure to do so is negligence which bars a recovery for injury received from being struck by the approaching car. *Omelaer v. Pittsburg etc. Traction Co.*, 901.
27. **STREET RAILWAYS.—WHILE PEDESTRIANS HAVE A RIGHT** to be upon and travel along a public highway, they are bound to take notice of the dangers incident to public travel thereon, and especially is this true where street-cars are constantly passing and repassing propelled by electricity. *McGee v. Consolidated Street Ry. Co.*, 507.
28. **STREET RAILWAYS—NEGLIGENCE.**—It is not negligence per se not to have a headlight attached to the dashboard of a street railway car when a municipal ordinance governing such cars only requires that they shall, after sunset, have colored signal lights in the front and rear, and such lights are in fact carried. *McGee v. Consolidated Street Ry. Co.*, 507.
29. **JURY TRIAL—NEGLIGENCE—INVADING THE PROVINCE OF THE JURY.**—In an action to recover for injuries received by a person while riding as a passenger in a street-car from its collision with a railway train, the court should not instruct the jury that if, in approaching the crossing of the street over which the street-car was being operated, the servants of the railway corporation did not keep a lookout for the cars and other vehicles, or were running the train at a greater rate of speed than allowed by an ordinance of the city, and if the collision resulted from, and would not have occurred but for, such negligence, the jury should find for the plaintiff. Whether the conduct of the servants of the defendant constituted negligence is a question of fact for the jury. *Gulf etc. Ry. Co. v. Pendry*, 125.
30. **CONTRIBUTORY NEGLIGENCE IS NOT IMPUTABLE TO A PERSON** riding as a passenger in a street-car from the mere fact that while so riding he did not exercise any care to discover an approaching railway train. *Gulf etc. Ry. Co. v. Pendry*, 125.
31. **STREET RAILWAYS—CONTRIBUTORY NEGLIGENCE.**—One about to cross a street upon which cars are operated is bound to look in both directions before getting on the track, and, if injured by a car which he would

have seen and avoided had he looked in the direction whence it was coming, he is guilty of such contributory negligence as precludes his recovery of compensation. *McGee v. Consolidated Street Ry. Co.*, 507.

See CORPORATIONS, 5; EMINENT DOMAIN; JOINT LIABILITY, 2; MANDAMUS; MUNICIPAL CORPORATIONS, 14, 16; NEGLIGENCE, 1, 4.

REAL PROPERTY.

1. **THE RIGHT OF LATERAL SUPPORT** is an absolute right of property, and the owner has a legal remedy against one who removes the natural support of the soil, which is based, not upon negligence, but upon the violation of the right of property. *Schultz v. Bower*, 630.
2. **THE RIGHT OF LATERAL SUPPORT** applies only to the land itself, and not to the buildings or other artificial structures thereon. *Schultz v. Bower*, 630.
3. **LATERAL SUPPORT—ACTIONABLE WRONG.**—If one, by digging in his own land, causes the adjoining land of another to fall, the actionable wrong is not the excavation, but the act of allowing the other's land to fall. *Schultz v. Bower*, 630.
4. **WHAT WILL NOT RENDER A LAWFUL BUSINESS UNLAWFUL.**—The business usually carried on in a roundhouse and machine shop, though smoke dirt, and soot are emitted therefrom, is in itself lawful, and the fact that the building in which it is carried on is partly in a public alley does not render the business itself unlawful. *Kaje v. Chicago etc. Ry. Co.*, 627.
5. **TRESPASS—CHILDREN—DAMAGES—NONSUIT.**—If a child, while trespassing upon the open premises of a factory where typesetting machines are manufactured, and there purloining type metal or scrap iron belonging to the manufacturer, is injured by the sudden discharge of water and steam from a pipe connected with an engine in the factory, the presence of the child being unknown to the engineer, the manufacturer not owing any duty to the child, under such circumstances, is not liable in an action by its father to recover damages for the injury and for the amount expended for medicines and medical attention. *Mergenthaler v. Kirby*, 371.
6. **NEGLIGENCE—INJURY TO TRESPASSING CHILD.**—The owner of a city lot, on which he is constructing a building, is not liable for injury to a trespassing child caused by the falling of building stone while playing on the lot without the knowledge of the owner, or any express or implied invitation or inducement to enter upon the premises. *Witts v. Stifel*, 668.
7. **LICENSEE—DUTY OF LANDOWNER.**—A BOY WHO VISITS PREMISES where dangerous machinery is being operated, to amuse himself by riding in the teams and assisting the employees, is, at most, only a licensee and volunteer, to whom the owner of the premises and business owes no duty except to abstain from injuring him by active misconduct. Nor is it material that the boy acted under the direction of one of the employees. *Shea v. Gurney*, 446.

See LEGACIES, 1.

RECEIVERS.

1. **A RECEIVER** is merely a ministerial officer of the court. The title to the property does not change, and his custody is that of the court. *Bell v. American Protective League*, 481.

- 2. LANDLORD AND TENANT.**—A RECEIVER TAKING POSSESSION OF A LEASEHOLD ESTATE DOES NOT BECOME THE ASSIGNEE of the term, nor liable on the covenants of the lease. He is answerable only for reasonable rent during the time he retains possession. *Bell v. American Protective League*, 481.

See CHATTEL MORTGAGE, 7.

RECORDS.

See APPEAL, 5; BIGAMY, 7; COURTS; INSURANCE, 27.

REFORMATION.

See DEEDS, 2-5.

REMAINDERS.

See ADVERSE POSSESSION, 1; WILLS, 2.

REPEAL.

See STATUTES, 7.

REPLEVIN.

See ESTOPPEL, 4.

RESCISSIION.

See FRAUD, 4; SALES, 4; VENDOR AND PURCHASER, 2.

RES GESTÆ.

See EVIDENCE, 3; RAILROADS, 16.

RES JUDICATA.

See BAIL; JUDGMENTS, 3-5.

RETURN.

See PROCESS, 3; SHERIFFS; TROVER, 2.

REVERSIONS.

See ADVERSE POSSESSION, 1.

REVOCATION.

See WILLS, 6.

RIGHT OF WAY.

See RAILROADS, 1, 3-5.

SALES.

- 1. PLACE OF.**—If a seller of meats residing and doing business outside of a city receives an order from a person residing therein to bring him meats of a certain kind at an agreed price, and the seller delivers the meat and receives payment within the city limits, this is a sale therein violating an ordinance prohibiting the sale of meats within the city without a license. *State v. Wernwag*, 873.

2. **PLACE OF—DELIVERY.**—In a sale of goods generally the contract is executory, and no property in them passes, and the sale is not complete until delivery. *State v. Wernwoag*, 873.
 3. **THE PRICE OF SERVICE OF A STALLION** for breeding purposes may be recovered if the animal has not been advertised or held out for public use, although he has not been registered as required by statute. *Briggs v. Hunton*, 318.
 4. **RESCISSIION.—THE FRAUD OF A THIRD PARTY** inducing the purchase of goods cannot entitle the purchaser to rescind. If the seller is not a party to the fraud the contract must stand. *Nash v. Minnesota Title Ins. etc. Co.*, 489.
- See **ANIMALS**; **CHATTEL MORTGAGES**, 5; **EXECUTION**, 1-4; **INTOXICATING LIQUORS**; **PLEADING**, 2; **PLEDGE**, 1.

SETOFF.

1. **INSOLVENCY AS EQUITABLE GROUND FOR.**—The insolvency of a party is a distinct equitable ground for setoff against him, and this equitable right of the debtor cannot be taken away by the insolvent's assignment for the benefit of creditors. *St. Paul etc. Trust Co. v. Leck*, 576.
2. **INSOLVENT BANK—DEPOSITORS.**—If a bank becomes insolvent and its effects are put into the hands of a receiver, its depositors indebted to it by promissory notes may set off against such notes in the hands of the receiver the amounts due them on their deposits. *State v. Brobston*, 138.
3. **RECEIVER OF INSOLVENT BANK.**—Although the receiver of an insolvent bank has obtained an order of court directing him to allow setoffs in settling the claims of interested parties, he will act at his peril concerning the existence and rightfulness of any demand he may allow as a setoff, where the record does not show what claims of setoff should be allowed. *State v. Brobston*, 138.

SHERIFFS.

- OFFICERS—PRESUMPTION—COLLATERAL ATTACK.**—If the return of a sheriff shows that he has levied on certain designated property, it is presumed, on collateral attack, that such property belonged to the judgment debtor, although that is not shown by the return. *Hogue v. Corbit*, 232.

SHIPPING.

1. **GENERAL AVERAGE.**—The obligation to contribute to a general average loss, or to the general average expenses, springs from the law itself, and not from any contract between the parties concerned. It is a consequence of the common danger, where natural justice requires that all should contribute to indemnify for the loss of property which is sacrificed by one in order that the whole adventure may be saved. *Marwick v. Rogers*, 436.
2. **THE OBLIGATION TO PAY GENERAL AVERAGE** rests upon the vessel, the cargo, and the freight in proportion to their respective values, and upon the owners of each in proportion to the value of their property at risk, and may be enforced by resorting to the lien upon the property saved from the common peril, or by action against the persons bound to contribute. *Marwick v. Rogers*, 436.

3. **GENERAL AVERAGE — THE OBLIGATION OF A CHARTERER OF A VESSEL WHO IS ALSO THE OWNER OF THE CARGO** to contribute to the general average is not waived by a provision in the charter party that all liability of charterers under the agreement shall cease as soon as the cargo is shipped on board. All questions, whether of demurrage or otherwise, to be settled by the consignees, the owner and captain looking to their lien on the cargo for these purposes. This clause affects him in his capacity of charterer only. *Marwick v. Rogers*, 436.
4. **ADVANCEMENTS BY PART OWNER FOR REPAIRS — CONTRIBUTION.** — A managing part owner of a vessel has authority to advance money for necessary repairs to the ship in a foreign port, and may compel contribution from the other part owners. *Hill v. Crocker*, 321.
5. **CONTRIBUTION — NONSUIT AT LAW AS DEFENSE.** — A part owner of a ship who is liable to contribution to another part owner who has paid a note given by all the part owners cannot resist recovery on the ground that he has obtained a nonsuit in an action brought against him by the holder of the note. *Hill v. Crocker*, 321.

SIDEWALKS.

See MUNICIPAL CORPORATIONS, 19, 22.

SLANDER.

See LIBEL, 8.

SPECIFIC PERFORMANCE.

1. **SPECIFIC PERFORMANCE WILL BE ENFORCED OF A COVENANT IN A LEASE** that during the term the lessor will reasonably light and heat the demised premises. The fact that the court may be called upon to form a scheme for heating and lighting, and to provide the proper apparatus, does not justify it in declining jurisdiction. *Jones v. Parker*, 485.
2. **HUSBAND AND WIFE — CONSIDERATION.** — A husband cannot compel the specific performance of his wife's contract to convey to him certain real estate if no consideration for such contract is made to appear. *Greene v. Greene*, 724.
3. **HUSBAND AND WIFE — WIFE'S CONTRACT.** — In a suit by a husband to compel the specific performance of his wife's contract to convey to him certain real estate, specific performance should not be decreed when her defense is that the contract was procured by fraud and duress and undue influence exercised over her by her husband, and the evidence establishes that the contract was executed because of a species of matrimonial coercion and undue influence, though it fails to establish fraud or duress. *Greene v. Greene*, 724.
4. **HUSBAND AND WIFE — WIFE'S CONTRACT — BURDEN OF PROOF.** — If a husband claims, in an action by him to compel specific performance of his wife's contract to convey to him certain real estate, that the consideration for the contract was her love and affection for him, or that she intended because he was her husband to make a gift of the land to him, the burden is upon him to prove that she made the contract freely and voluntarily, with full knowledge of all the facts surrounding it without any fraud being practiced upon her, and that she was not induced to make it by his coercion or undue influence. *Greene v. Greene*, 724.

STATUTE OF LIMITATIONS.

See LIMITATIONS OF ACTIONS.

STATUTES.

1. **SUBJECT OF ACT NOT EXPRESSED IN ITS TITLE.**—The title of an act entitled "An act amending section 2 of chapter 8 of the charter of the city of Minneapolis," creating liability for damages caused by a change of street grade, and providing for a special tax or assessment on property benefited to pay the same, is sufficient, and the law is not unconstitutional because the subject thereof is not expressed in its title. *Kelly v. Minneapolis*, 605.
2. **POWER OF COURTS TO RECEIVE EVIDENCE OF LEGALITY OF ENACTMENT.**—The fact that a statute, regular on its face and in due form, is ratified and approved by the genuine signatures of the presiding officers of both houses of the legislature, and deposited in the proper office, is conclusive evidence that it was regularly and legally enacted, and the courts cannot go behind this record for any cause to ascertain from the journals, or otherwise, how such record was established. *Carr v. Cobb*, 801.
3. **CONSTITUTIONAL LAW.**—IF TWO CONSTRUCTIONS OF A STATUTE ARE POSSIBLE, that should be adopted which is most reasonable and in accord with the declared and recognized policy of the state. *Meroney v. Atlanta Building etc. Assn.*, 841.
4. **CONSTITUTIONAL LAW.**—PART OF A STATUTE MAY BE UNCONSTITUTIONAL and void and another part valid, even though the incongruous provisions be contained in the same section, if when the unconstitutional portion is stricken out that which remains is complete in itself and capable of being enforced according to the legislative intent, independent of that which is rejected. A statute may also be valid as to some classes of cases, and void as to others. *Grimes v. Eddy*, 653.
5. **CONSTITUTIONAL LAW.**—IMPORTATION OF DISEASED OR INFECTED LIVESTOCK into the state may be prohibited by statute, which may prescribe the kind of cars to be used for their transportation, as well as other reasonable and precautionary measures. *Grimes v. Eddy*, 653.
6. **RETROACTIVE OPERATION OF.**—A statute, enacted after proceedings to acquire property for use as a public street have been commenced, is not applicable to such proceedings, where no step in them has been taken pursuant to such statute. *Cincinnati etc. Ry. Co. v. Anderson*, 285.
7. **REPEAL—MARRIED WOMEN AS WITNESSES.**—A statute disabling a married woman from testifying is not repealed by the enactment of a statute entitled "Married Women," but containing no reference to the right of a married woman to testify. *Greene v. Greene*, 724.

See HABEAS CORPUS, 1.

STOCK.

See CORPORATIONS, 7, 10, 12, 15.

STREETS.

See EMINENT DOMAIN; MUNICIPAL CORPORATIONS, 12, 14-22; RAILROADS, 2-6, 23, 24.

STRUCK JURY.

See TRIAL, 2.

SUNDAY.

WALKING OR RIDING IN THE OPEN AIR, in a quiet and civil manner, with no object of business or pleasure, except the enjoyment of air and exercise for the promotion of health, is not a violation of a Sunday law. *Cleveland v. Bangor*, 326.

SURETYSHIP.

1. **EMBEZZLEMENT.**—The sureties on a bond given by an embezzler for the return of the money taken can avoid it only by showing that it was given for an unlawful purpose, or that its execution was obtained by unlawful means. *Portner v. Kirschner*, 925.
2. **EMBEZZLEMENT—COMPOUNDING FELONY.**—The sureties on a bond given by their principal to secure the return of money embezzled by him cannot avoid the obligations of the bond on the ground that it was given for an illegal consideration, without proof that criminal proceedings have been stifled thereby, or that fraud or coercion has been practiced upon them. *Portner v. Kirschner*, 925.
3. **EMBEZZLEMENT—COMPOUNDING FELONY.**—In an action against the sureties on a bond given by an embezzler to secure the return of the money taken, an affidavit of defense alleging that the debt secured was money embezzled, that the creditor accepted the bond in lieu thereof, and that such acceptance worked the release of the debtor from all liability to prosecution for the crime of embezzlement, is insufficient. It should also allege the employment of criminal proceedings or of threats to resort to them, as a means of coercion to compel the execution of the bond. *Portner v. Kirschner*, 925.
4. **EXTENSION OF TIME.**—A contract between a debtor and creditor that the time for paying the debt shall be extended one year, and the former shall forego his right to payment before the expiration of that time, and will pay interest, is a contract having consideration sufficient to enforce it, and therefore releases the surety of the debtor. *Benson v. Phipps*, 123.

See EMBEZZLEMENT.

SURVEYS.

See BOUNDARIES.

TAXES.

LEGISLATURE CANNOT AUTHORIZE UNDER PRETENSE OF SANITARY REGULATIONS.—The legislature cannot authorize the power of taxation under the pretense of sanitary regulations or other exercise of the police power of the state in the interest of the public health or safety. *Littlefield v. State*, 697.

TELEGRAPH COMPANIES.

1. **TELEGRAPH COMPANIES MUST HAVE SUFFICIENT FACILITIES** to transact all business offered to them at all points at which they have offices. *Leavell v. Western Union Tel. Co.*, 798.

2 DUTY TO TRANSMIT MESSAGES OVER ITS OWN LINE—EXCESSIVE TARIFF.

If a telegraph company can send a message to its destination over its own line, it cannot, by sending it over the line of another company, exact a tariff of the sender in excess of what it would be allowed to charge for sending it over its own line. *Leavell v. Western Union Tel. Co.*, 798.

3 THE DAMAGES FOR WHICH A TELEGRAPH CORPORATION IS LIABLE upon failure to transmit and deliver with proper diligence a message concerning sickness or death are such as fairly and reasonably may be considered as arising naturally, and according to the usual course of things, from a breach of its contract, or such as reasonably may be supposed to have been in the contemplation of the parties as a probable result of such breach. *Western Union Tel. Co. v. Linn*, 58.

4 DAMAGES FOR WHICH NOT LIABLE.—From a message informing the addressee that another person was very low, and asking whether he could come, a telegraph corporation is not required to understand that the person so mentioned may die before the message is delivered, and that the addressee, were it delivered in proper time, might answer that he would come, and that upon such answer the funeral would be postponed until he could arrive. Hence, the corporation, though its negligence causes the nondelivery of the message at the proper time, is not answerable for damages arising from the consequent inability of the addressee to be present at the funeral. *Western Union Tel. Co. v. Linn*, 58.

5 DISCRIMINATION.—A contract by which a telegraph company gives to a railroad company a preference over its line to the exclusion of others is an illegal discrimination, and does not justify it in exacting an extra tariff for sending a message over the line of another company to a point at which it also has a line. *Leavell v. Western Union Tel. Co.*, 798.

6 DISCLOSURE OF CONTENTS OF TELEGRAM—REMOTE DAMAGES.—If an agent contracts to sell goods, expecting to obtain a commission, and a delay occurs in the delivery, although no definite time is fixed, during which the contents of a telegram from the principal, explaining the delay, is, by some default of the telegraph company, made known to the customer, who immediately buys elsewhere thus causing the agent to lose his commission, the agent cannot recover damages against the company for such loss on the theory that if the contents of the telegram had not been made known to the customer, an arrangement could have been made with him whereby the sale would have been consummated, and the agent would have obtained his commission. Such damages are too remote and uncertain for a recovery. *Western Union Tel. Co. v. Watson*, 151.

7 A TELEGRAPH CORPORATION IS GIVEN SUFFICIENT NOTICE OF THE RELATIONSHIP of the person to whom the message is directed and a person named therein when the message states that such person is very low and asks whether the addressee can come. The terms of such message notify the corporation that he is seriously interested in the condition of the person described therein as being very low. *Western Union Tel. Co. v. Linn*, 58.

8 A TELEGRAPH CORPORATION CANNOT BY ITS CONTRACT PROTECT ITSELF from the consequences of the negligence of its servants in failing to deliver a message with reasonable diligence. *Western Union Tel. Co. v. Linn*, 58.

9. **DAMAGES—PENALTY.**—A claim against a telegraph company for damages, and a claim against it for a statutory penalty, are separate and distinct. *Mathis v. Western Union Tel. Co.*, 167.
10. **USE OF BLANKS—PENALTY CLAUSE.**—A telegraph company cannot require a customer to use a blank with a stipulation upon it exempting the company from liability for a statutory penalty, and his voluntary use of it is not binding on him. The matter is not a subject of contract between the parties, and any agreement between them tending to defeat such penalty is void. *Mathis v. Western Union Tel. Co.*, 167.
11. **LIABILITY OF FOR STATUTORY PENALTY.**—Notwithstanding a stipulation printed upon a blank on which a telegraph message is sent, that "the company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission," the company is liable for a statutory penalty though the claim for it is not presented within such time. *Mathis v. Western Union Tel. Co.*, 167.
12. **PUBLIC POLICY—OBJECT OF STATUTE IMPOSING PENALTY.**—A statute imposing a penalty upon telegraphic companies for default in the transmission or delivery of messages is based upon public policy, the object of which is to quicken the diligence of these companies in the performance of their duties to the public. *Mathis v. Western Union Tel. Co.*, 167.

See INTERSTATE COMMERCE, 2.

TENANTS IN COMMON.

See COTENANCY.

TICKETS.

See RAILROADS, 11-12.

TIMBER.

See TRESPASS, 1.

TORT-FEASORS.

See JOINT LIABILITY, 1, 2.

TORTS.

See DAMAGES, 1.

TRADEMARKS.

See PATENTS.

TRESPASS.

1. **CHANGE IN FORM OF PROPERTY—MEASURE OF DAMAGES.**—The owner of trees cut from his land by a willful trespasser, and by him manufactured into railroad ties, and sold to an innocent purchaser, is entitled to recover from the latter the value of the property at the time of the purchase without any deduction for the increased value put upon it by the labor of the trespasser. *Powers v. Tilley*, 304.
2. **CHANGE IN FORM OF PROPERTY—RIGHT TO RETAKE.**—A trespasser cannot acquire any property in the chattels taken by expending labor upon them. They still remain the property of the original owner who

may retake them wherever he may find them, free from any claim by the trespasser for their increased value by reason of his labor. *Powers v. Tully*, 304.

TRESPASSERS.

See REAL PROPERTY, 5-7.

TRIAL.

1. **THE FACT THAT A PERSON IS EXEMPT FROM JURY DUTY DOES NOT DISQUALIFY HIM** from service. While he may be excused at his own election, or excepted to by a party, if he serves, the action of a jury of which he is a member is not made void. *Commonwealth v. Hayden*, 468.
2. **PRACTICE—STRUCK JURY.**—If one of the parties to an action demands a struck jury, and, on being furnished with the requested list of names, refuses to proceed further, the clerk of the court may represent him, and with the adverse party proceed to strike off the names until the proper number of jurors is selected. *Dorsey Machine Co. v. McCaffrey*, 290.
3. **PRACTICE.—THE OFFICE OF A MOTION FOR A VENIRE DE NOVO** is to secure a new trial for the insufficiency of a verdict, general or special, to support a judgment in favor of either party. The instances are few where the motion may properly be addressed to a special verdict, since by the practice in this state conclusions, opinions, evidentiary facts, and the like, are disregarded, and the facts properly found are alone considered, and if an essential fact is not found it is treated as not proved. *Jones v. Oasler*, 274.
4. **CONTINUANCE.**—A motion for a continuance of the trial to obtain absent witnesses is properly overruled upon a showing that they were not present at the time of the occurrence in question, or that their proposed evidence is not probably true, or that it is too generally stated, or stated in mere conclusions. *Reynolds v. State*, 25.
5. **A VIEW OF THE PREMISES** is allowed, not for the purpose of furnishing evidence upon which a verdict is to be found, but solely for the purpose of better enabling the jury to understand and apply the evidence given in court. *Schultz v. Bower*, 630.
6. **EVIDENCE OUT OF COURT.**—The fact that the jury, after the evidence in a criminal case is submitted and before a verdict is rendered, read a complete and accurate newspaper account of the evidence, not manifesting any prejudice nor bias, nor indicating the drift of public opinion as to the guilt or innocence of the accused, is not prejudicial to him, and though not properly before the jury, is not such additional evidence as to vitiate the verdict. *Williams v. State*, 21.
7. **CONSIDERATION OF IMPROPER EVIDENCE.**—If evidence offered by the state to prove that the accused, shortly after his arrest, attempted to commit suicide, is promptly excluded by the court under instructions to the jury that it must disregard the matter, the fact that it is again referred to and stated to be true after the jury has retired and before verdict does not vitiate such verdict, if the jurors all agree not to consider the matter and state under oath that they were not influenced thereby. *Williams v. State*, 21.
8. **NEWSPAPER REPORT OF EVIDENCE.**—The fact that a complete and accurate newspaper account of the evidence in a criminal case contains a headline stating that "defendant was not placed on the stand,"

- and is read by the jury before a verdict is rendered, does not vitiate such verdict. *Williams v. State*, 21.
9. **CONFLICT OF EVIDENCE** in a criminal case is peculiarly a question to be settled by the jury. *Williams v. State*, 21.
 10. **INSTRUCTIONS—ALL ISSUES MUST BE PRESENTED.**—Whatever may be the views entertained by a court as to the truth or falsity of evidence adduced, it is incumbent on it to charge the jury, under appropriate instructions, on the law applicable to every phase of the testimony adduced on the trial. *Jones v. State*, 46.
 11. **DISCRETION IN SUBMISSION OF ISSUES.**—It is within the discretion of the trial court to submit specific issues arising out of the general issue to the jury, instead of submitting those which are more general. *Springer v. Shavender*, 791.
 12. **PRACTICE—SPECIAL VERDICTS.**—Omissions of essential facts do not vitiate a special verdict, and a motion for a venire de novo will not lie therefor. *Jones v. Casler*, 274.

TROVER.

1. **MORTGAGE OF CHATTELS—EQUITABLE ASSIGNMENT.**—One who purchases notes secured by a mortgage of chattels, and which are indorsed and delivered to him under an oral agreement to make a written assignment of the mortgage, cannot maintain an action in his own name for the conversion of the property. *Baker v. Seavey*, 475.
2. **MORTGAGE OF CHATTELS.**—A SECOND MORTGAGEE of chattels, who is neither in actual possession nor entitled to such possession, cannot maintain an action for their conversion. *Baker v. Seavey*, 475.
3. **EVIDENCE—CONTRADICTING OFFICER'S RETURN.**—If an officer is sued for the conversion of property, and his return does not enumerate all the articles attached, he may prove that he did not attach or convert the articles claimed by the plaintiff, and even if his return does contain such enumeration, it is not conclusive in an action against him by a third person, and the officer may, as against the latter, prove that he did not take all the articles stated in the return. *Baker v. Seavey*, 475.

TRUST DEEDS.

See TRUSTS, 2.

TRUSTS.

1. **A TRUSTEE CANNOT BUY UP A DEBT OR ENCUMBRANCE** for which a trust estate is answerable for less than is actually due thereon, and make a profit for himself. Such purchase inures for the benefit of the trust estate, and the cestui que trust is entitled to the advantage of the purchase. *Petrie v. Badenoch*, 503.
2. **TRUSTEES—POWER OF SALE.**—A trustee is not permitted to deprive himself of a power of sale conferred for the benefit of the trust; nor to so fetter its exercise by himself or his successor as to defeat the purpose of the trust. *Hickok v. Still*, 880.
3. **MORTGAGE—TRUSTEE—COMPENSATION FOR FORECLOSURE.**—Under a deed of trust providing that the trustee therein shall be entitled to reasonable compensation for all services rendered in the execution of the trust, he may, upon foreclosure, be allowed reasonable remuneration for his

services and reasonable counsel fees out of the proceeds of the sale. *Quinn v. Union Trust Co.*, 186.

See HUSBAND AND WIFE, 2.

USURY.

1. **COURTS LOOK NOT MERELY AT THE WORDS**, but at the substance, of a transaction to determine whether it is usurious. *Meroney v. Atlanta Building etc. Assn.*, 841.
2. **PENALTIES, PREMIUMS, OR FINES** amounting to more than legal interest, and imposed for the nonpayment of money, are usurious. *Meroney v. Atlanta Building etc. Assn.*, 841.
3. **WHAT IS NOT—ILLUSTRATION.**—A loan of eight hundred and fifty dollars for the term of forty years is not rendered usurious by the lender taking a bond for one thousand dollars, bearing seven per cent interest per annum, payable semi-annually—although it bears interest from a date previous to its delivery, and provides that, after ninety days' default upon any installment of interest, the whole of the principal shall become due—if the gross amount of interest for the full term would not be equal to eight per cent per annum, if a fair and legal adjustment of the interest can be made in case the bond becomes due before the end of the term because of a default in the payment of interest, and if no device or contrivance to cover up usury appears. *Georgia Southern etc. R. R. Co. v. Mercantile Trust etc. Co.*, 153.
4. **A LOAN BY A FOREIGN CORPORATION** to a citizen of another state, secured by mortgage on land in that state at usurious interest there, is governed in the settlement of interest upon foreclosure by the law of the latter state, although the contract of loan and mortgage stipulates that it is "solvable" by the laws of the state of the domicile of the corporation, and is made with reference to its laws. *Meroney v. Atlanta Building etc. Assn.*, 841.

See ASSOCIATIONS.

VACANT AND UNOCCUPIED.

See INSURANCE, 12.

VENDOR AND PURCHASER.

1. **RIGHT OF PURCHASER TO RELY UPON VENDOR'S REPRESENTATIONS.**—A purchaser of real estate has a right to believe and rely upon representations made to him by his vendor as to the character, quality, and location of the property when the facts concerning which the representations are made are unknown to the vendee, although they are a matter of public record. *Hook v. Bowman*, 691.
2. **RESCISSION OF CONTRACT OF SALE FOR MISREPRESENTATION—ILLUSTRATION.**—If one wishing to buy two lots in a city addition for building purposes is shown corners and stakes by the owner's agent, who represents that one is a corner lot, which is false, that the other is contiguous thereto, and that both front on a certain street, but the streets have not been opened through the addition, and the prospective purchaser, believing and relying on the truth of such representations, enters into a written contract with the owner, agreeing to purchase and to pay for the lots, such representations, under the circumstances,

are material, and entitle the former to a rescission of the contract. *Hook v. Bowman*, 691.

3. **MISREPRESENTATION—LACHES.**—If a vendor of real estate makes material representations as to the character, quality, or location of his land, and the vendee believes, relies, and acts on such representations, which prove to be false, the vendor cannot shield himself from the consequences of his fraudulent conduct by interposing the plea of laches on the part of his vendee. *Hook v. Bowman*, 691.

4. **NOTICE OF LEASE.**—As between a vendor and vendee, the latter is charged with notice of the covenants in a lease of which he knows, but has not examined, and as to the contents of which he has not been misled, but he is not charged with notice of a distinct collateral agreement. *Wertheimer v. Thomas*, 882.

5. **LEASE AS NOTICE OF OPTION TO PURCHASE.**—An agreement by a landlord giving his tenant an option to purchase, though incorporated in the lease, is no part of it, and is not notice to a third party who agrees to purchase from the landlord. If the tenant exercises his option to purchase during his tenancy, such third person may purchase from him, and recover the difference in price from the landlord. *Wertheimer v. Thomas*, 882.

VENDOR'S LIEN.

See **MECHANIC'S LIEN**, 6.

VENIRE DE NOVO.

See **TRIAL**, 3, 12.

VERDICT.

See **NEW TRIAL**; **TRIAL**, 12.

VERIFICATION.

See **MECHANIC'S LIEN**, 3, 10.

VIEW OF PREMISES.

See **APPEAL**, 10; **TRIAL**, 5.

WAGES.

See **EXECUTION**.

WAIVER.

See **APPEAL**, 1, 6; **INSOLVENCY**, 1; **INSURANCE**, 10, 20; **LANDLORD AND TENANT**, 5-7; **MECHANIC'S LIEN**, 7-9.

WARRANTY.

See **CONTRACTS**, 2.

WATER COMPANIES.

MUNICIPAL CORPORATION—CONTRACT WITH—RIGHT OF A THIRD PERSON TO RECOVER DAMAGES FOR BREACH OF.—If a contract is made between a municipality and a corporation that the latter will furnish water for the extinguishment of fires and other purposes, a private citizen cannot

recover of such corporation for damages sustained by him for the breach of its contract with the city. *Fitch v. Seymour Water Co.*, 258.

WATERS.

1. **NAVIGABLE STREAMS ARE NATURAL HIGHWAYS.**—The public easement therein, whatever its extent, is paramount to the private right of the riparian proprietor. *Commissioners v. Catawba Lumber Co.*, 829.
NAVIGABLE STREAM—WHAT IS.—It is not necessary to establish the navigability of a river, and that a public easement exist therein, to show that it is susceptible of use continuously during the whole year for the purpose of floatage, but it is sufficient if it appear that business men may calculate that, with tolerable regularity as to seasons, the water rises to and remains at such a height therein as enables them to make it profitable to use as a highway for transporting logs to mills or markets. *Commissioners v. Catawba Lumber Co.*, 829.
2. **NAVIGABLE STREAMS ARE SUCH AS ARE FLOATABLE** or capable of valuable use in bearing the products of the mines, forests, and tillage of the country to mills or markets. *Commissioners v. Catawba Lumber Co.*, 829.
4. **FLOATABLE STREAMS.**—If a stream, from natural causes, rises to a sufficient height eight or ten times a year, continuing for two or three days at a time, to float to mill all logs that have been rolled into it, it is a floatable stream and a natural highway, in which the public has an easement, the reasonable use of which is paramount to the rights of all others. *Commissioners v. Catawba Lumber Co.*, 829.
5. **FLOATABLE STREAMS.**—It is not necessary that a stream, to be a highway, should be capable of floating logs at all seasons of the year. Its public character depends on its fitness to answer the wants of those whose business requires its use. If the stream is not always navigable it must be capable of floatage, as the result of natural causes, at periods recurring from year to year, and continuing for sufficient time in each year to make it useful as a highway. *Commissioners v. Catawba Lumber Co.*, 829.
6. **STREAMS NOT FLOATABLE** can be used for the transportation of logs only by a license from the owner of the bed of the stream or the riparian proprietor. *Commissioners v. Catawba Lumber Co.*, 829.
7. **RIGHT OF FLOATAGE** in a stream must be exercised with due care for the avoidance of injury to the interests of the riparian proprietors and the owners of the soil beneath the bed of the stream. On the other hand, the stream must be so bridged as to permit of its use for the purpose of floatage. *Commissioners v. Catawba Lumber Co.*, 829.
8. **BRIDGES CONSTRUCTED OVER FLOATABLE STREAMS** so as, by interposing a barrier to floating logs every time the streams rise sufficiently high to carry logs over the shoals, to practically prevent their use by the public, are nuisances and unlawful obstructions. *Commissioners v. Catawba Co.*, 829.
9. **A GRANT OF LAND BOUNDED BY A WATERCOURSE** extends the title of the grantee to the middle of the lake or stream, though it has been meandered. *Grand Rapids Ice etc. Co. v. South Grand Rapids Ice etc. Co.*, 516.
10. **BOUNDARIES.**—THOUGH A BOUNDARY IS SAID TO RUN ALONG A STREAM, or monuments are mentioned which occupy its bank, this does not limit

the grant to the bank. The shore proprietor takes by virtue of shore ownership, and acquires his interest in the bed of the stream as appurtenant to the grant. *Grand Rapids Ice etc. Co. v. South Grand Rapids Ice etc. Co.*, 516.

21. **BOUNDARIES—LAKES, HOW APPORTIONED BETWEEN ADJACENT PROPRIETORS.**—Where lands are granted fronting upon non-navigable waters, they should be apportioned between the different proprietors by dividing the water area in proportion to the shore frontage. *Grand Rapids Ice etc. Co. v. South Grand Rapids Ice etc. Co.*, 516.

22. **SURFACE WATERS.**—AT COMMON LAW surface water, like the waters of the sea, was regarded as a common enemy, and any landowner had the right to expel it from his own land without regard to the injury thereby occasioned to another proprietor. *Mayor v. Sikes*, 132.

23. **SURFACE WATERS.**—UNDER THE CIVIL LAW, while the lower proprietor is bound to receive the surface water which naturally flows from the estate above, the owner of the latter has no right, by diverting surface water which he ought to receive from an estate above his own and to which his estate is servient, thus to relieve his own estate of the servitude which nature placed upon it, and cast the whole burden upon the estate of his neighbor below. *Mayor v. Sikes*, 132.

24. **SURFACE WATERS.**—One landed proprietor has no right to concentrate and collect surface water, and thus cause it to be discharged upon the land of a lower proprietor in greater quantities at a particular locality, or in a manner different from that in which the water would be received by the lower estate if it simply ran down upon it from the upper by the law of gravitation. *Mayor v. Sikes*, 132.

See MUNICIPAL CORPORATIONS, 12.

WATER WORKS.

See MUNICIPAL CORPORATIONS, 12.

WILLS.

1. **IT IS PRESUMED** that a person in making and publishing his will intends to dispose of his whole estate. *Whitcomb v. Rodman*, 181.

2. **CONSTRUCTION OF—DEVISE.**—If a life estate in property is devised by will to a woman, with remainder to her children, if she leaves any, and to her brother if she does not leave any, and the brother dies first, and she dies without issue, having devised the property to her mother, the estate will pass to the heirs of the remainderman alive when the sister died. She not being in esse when the contingency happened, and the estate fell into possession, he could neither inherit nor devise it. It would not, therefore, pass to her upon the remainderman's death, and could not pass by her will to her mother. *Garrison v. Hill*, 363.

3. **CONSTRUCTION.**—THE INTENT of the testator must govern in the construction of his will, if not contrary to some positive rule of law, although in giving effect to it some words must be rejected or so restrained in their application as materially to change the literal meaning of the particular sentence. *Whitcomb v. Rodman*, 181.

4. **MISDESCRIPTION.**—While words cannot be added to a will, yet, in arriving at the intention of the testator, so much as is false in the description of the land devised may be stricken out, provided enough

remains to identify the premises intended to be devised. *Whitcomb v. Rodman*, 181.

5. **MISDESCRIPTION OF ESTATE.**—If a testator misdescribes his estate as being in different localities from the fact, putting one part in the locality of another, or describing land which he never owned, and sufficient appears upon the face of the will, as applied to the subject matter, to show that such misdescription is a mere mistake, it will not defeat the obvious intention of the testator. *Whitcomb v. Rodman*, 181.
6. **REVOCATION OF CHARITABLE BEQUEST BY CODICIL.**—If a testator makes a charitable bequest by will, and afterward executes a codicil in which he declares that "I hereby annul and revoke the bequest" to the charity, and "instead thereof I give and bequeath" the same sum to a trustee, to pay the income to two persons during their lives, and, upon their death, to pay the principal to such charity, the codicil does not revoke the bequest to the charity, but only postpones its time of payment. *Sloan's Appeal*, 889.
7. **SIGNATURE BY ANOTHER.**—If a testator in possession of all of his faculties of mind, but in the extremity of last illness, directs another to write out his testamentary directions and sign them for him, the will thus executed is valid under the statute, though the testator was physically able to sign his name, if the attaching of his signature by himself would have been at the risk of his life. *Diehl v. Rogers*, 908.
8. **PARDONS—WITNESS TO WILL.**—A person convicted of crime, but fully pardoned therefor, is competent as a witness to a will. *Diehl v. Rogers*, 908.
9. **POWER OF SALE—RENTS FROM RESIDUARY REAL ESTATE.**—A power of sale in a will does not work an immediate conversion of the land as between the executor and the heir or legatee. The title accruing on the death of the testator remains in the heir or legatee until divested by probate sale or the power contained in the will, and the executor has no power to collect rents from the residuary real estate and use them as assets of the testator's estate. *Appeal of Pennsylvania Co.*, 893.
10. **PROBATE OF LOST OR DESTROYED WILL.**—A petition for the probate of a will which alleges that the husband of the decedent after her death knowingly and fraudulently burned and destroyed her will sufficiently avers that it was in existence at the time of her decease. *Jones v. Casler*, 274.
11. **PROBATE OF LOST WILL, PETITION WHEN INSUFFICIENT AS AGAINST ADMINISTRATOR.**—If a petition for the probate of a lost or destroyed will shows that the administrator of the husband of the decedent was made a party, but that there was no allegation that he was such administrator or in any manner connecting him with the cause of action, though his name appears in the list of defendants, it is entirely insufficient as to such administrator. *Jones v. Casler*, 274.
12. **PROBATE OF LOST WILL—GENERAL ALLEGATIONS OF THE CONTENTS** of a lost will, though insufficient under ordinary circumstances to authorize its establishment, are, so far as such allegations disclose its contents, sufficient if it is further alleged that such will has been fraudulently destroyed by the husband of the decedent after her death, and that no copy has been preserved. In such a case to require a copy of the will or the language of the bequests in detail would offer a premium upon the rascality of one whose interest might suggest the destruction of the will. *Jones v. Casler*, 274.

13. **PROBATE OF PART OF A LOST OR DESTROYED WILL** is authorized when the evidence clearly establishes such part, though it does not disclose all the other parts, if the will has been fraudulently destroyed after the death of the decedent by her husband or other person against whose interest the probate of the will is sought. *Jones v. Casler*, 274.
14. **PROBATE OF DESTROYED WILL.—A CHARGE TO A JURY** that if they find any fact established by the preponderance of evidence they should state such fact in a special verdict, and that the provisions of the will should be clearly proved by two witnesses, or by a copy of the will and one witness, in a proceeding to establish a will alleged to have been fraudulently destroyed, is not subject to the criticism that the jury were charged to find the provisions of the will upon a mere preponderance of the evidence regardless of the number of the witnesses. *Jones v. Casler*, 274.
15. **PROBATE OF DESTROYED WILL.—SEARCH FOR A WILL** after the death of the decedent need not be shown when it is claimed such will was fraudulently destroyed after such death, and there is evidence to support such claim. *Jones v. Casler*, 274.
16. **PROBATE OF LOST OR DESTROYED WILL.—TWO WITNESSES** need not concur in their evidence as to the entire contents of an alleged lost or destroyed will so that the instrument can be reproduced in writing and written out at full length upon the records of probate. It is sufficient that they agree as to the substance of provisions conferring some property right upon devisees or legatees. *Jones v. Casler*, 274.
17. **PROBATE OF LOST WILL.—PRACTICE.**—It is not necessary that a special verdict in favor of the production of a lost or destroyed will should state that the facts found were proved by the testimony of two witnesses, nor that it should disclose the exact words of the will if it states their substance. *Jones v. Casler*, 274.
18. **DISPOSING MIND AND MEMORY.**—A disposing mind in making a will involves the exercise of so much mind and memory as enables a person to transact common and simple kinds of business with that intelligence belonging to the weakest class of sound minds. A disposing memory exists only when one can recall the general nature, condition, and extent of his property, and his relations to those to whom he gives, and also to those from whom he excludes, his bounty. *Hall v. Perry*, 352.
19. **TESTAMENTARY CAPACITY.—TO HAVE A SOUND AND DISPOSING MIND AND MEMORY** a testator must have active memory enough to bring to his mind the nature and particulars of the business to be transacted, and mental power enough to appreciate them, and act with sense and judgment in making his will. *Hall v. Perry*, 352.
20. **TESTAMENTARY CAPACITY.—THE BURDEN OF PROOF** is upon the proponent of a will contested for want of testamentary capacity, to prove that the testator at the time of the execution of the will had a mind sound enough properly to devise and bequeath his property, and mental capacity sufficient to enable him to understand that he was making a will. *Hall v. Perry*, 352.
21. **TESTAMENTARY CAPACITY** in a testator involves sufficient mental capacity to comprehend the condition of his property, his relations to the persons who are, or should be, the objects of his bounty, and the scope and bearing of the provisions of his will. He must have sufficient active memory to collect in his mind, without prompting, the

particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive their obvious relations to one another, and be able to form some rational judgment in relation to them. *Hall v. Perry*, 352.

- 32. **TESTAMENTARY CAPACITY.**—A sound and disposing mind in a testator does not imply that the powers of his mind may not have been weakened or impaired by old age or bodily disease. A testator may be incapacitated by age and failing memory from engaging in complex and intricate business, and incapable of understanding all parts of a contract, and yet be able to give simple directions for the disposition of his property by will. Great age may raise doubt of testamentary capacity, but it does not alone constitute testamentary disqualification. *Hall v. Perry*, 352.
- 33. **TESTAMENTARY CAPACITY.**—Great age does not alone constitute testamentary incapacity if the testator had a mind and memory sufficient in essentials, and capable of acting rationally, and the will is in consonance with definite and long-settled intentions, is not unreasonable in its provisions, and has been executed with fairness. *Hall v. Perry*, 352.
- 34. **MENTAL CAPACITY** to make a will, or what in any case shall be the standard of legal capacity, is a question of law. *Hall v. Perry*, 352.
- 35. **TESTAMENTARY CAPACITY.**—Weakness of memory, vacillation of purpose, credulity and vagueness of thought, may all exist with adequate testamentary capacity under favorable circumstances. *Hall v. Perry*, 352.
- 36. **TESTAMENTARY CAPACITY—EXPERT EVIDENCE.**—A family physician may express an opinion upon the actual condition of his patient's mind, but it is not competent for him to give a direct opinion upon his patient's mental capacity to make a will. *Hall v. Perry*, 352.

See **CONTRACTS**, 4; **EQUITY**; **EVIDENCE**, 12.

WITNESSES.

- 1. **DUTY OF PROSECUTION TO PRODUCE.**—In a criminal case the prosecution is not required to place every eyewitness on the stand. *Reynolds v. State*, 25.
- 2. **PROCESS—EXEMPTION OF NONRESIDENT WITNESS AND SUITOR FROM SERVICE OF.**—If a nonresident voluntarily appears in the courts of this state for the purpose of suing out an attachment for fraud against a citizen here, and gives a bond, but the attachment is quashed, he is not exempt from the service of a summons issued to bring him into court to respond in damages for the wrongful and malicious issuing of the attachment where he comes into this state, after the quashing of the attachment, for the purpose of testifying in the main action. *Mullen v. Sanborn*, 421.
- 3. **WITNESS—CREDIBILITY.**—A person who has been convicted of crime and then fully pardoned is a competent witness, but his credibility is for the jury if either party requests that it be submitted. *Dick v. Rogers*, 908.
- 4. **HUSBAND AND WIFE AS WITNESSES AGAINST EACH OTHER—SPECIFIC PERFORMANCE.**—Under a statute prohibiting a husband and wife from testifying against each other, except in certain criminal proceedings, neither can testify against the other in a suit by him against her to

- compel the specific performance of her contract to convey to him certain real estate. *Greene v. Greene*, 724.
6. A HUSBAND, THOUGH DIVORCED FROM HIS WIFE, is not a competent witness to testify to her alleged adultery occurring during the marriage. *Hanselman v. Donel*, 557.
8. JURY TRIAL—CHARGE AS TO CREDIBILITY OF WITNESSES.—An instruction that when witnesses are otherwise equally credible and their testimony otherwise entitled to equal weight, greater weight and credit should be given to those whose means of information were superior and also to those who swear affirmatively to a fact rather than to those who swear negatively or to a want of knowledge or recollection, is improper. The weight to be given to any witness is always a question for the jury. *Jones v. Casler*, 274.
7. PRESUMPTION.—DEFENDANT TESTIFYING IN HIS OWN BEHALF is presumed to tell the truth, but this presumption may be overcome in his case the same as in the case of any other witness. *Jackson v. State*, 30.
9. THE OPINION OF A WITNESS as to whether the children of a decedent had an expectation that she would have continued to aid them had she lived, is inadmissible. The witness should be restricted to a statement of the facts, and the jury left to draw their own conclusion therefrom. *San Antonio etc. Ry. Co. v. Long*, 87.
9. DISORDERLY HOUSE—EVIDENCE OF REPUTATION—CROSS-EXAMINATION. After a witness has testified that the general reputation of a house is that it is disorderly, he may be asked on cross-examination "if he knows what a disorderly house is." *Harkey v. State*, 19.
10. IMPEACHMENT.—IF DEFENDANT, TESTIFYING IN HIS OWN BEHALF, answers on cross-examination a question tending to disgrace him the cross-examining party is bound by such answer, if collateral to the issue and only going to the credit of the witness. *Jackson v. State*, 30.
11. DEFENDANT TESTIFYING IN HIS OWN BEHALF MAY BE CONTRADICTED, IMPEACHED, and sustained in the same manner, and occupies the same place, and is to be treated the same as other witnesses. He is liable to cross-examination as to any matter pertinent to the issues on trial. *Jackson v. State*, 30.
12. IMPEACHMENT.—CREDIBILITY OF DEFENDANT TESTIFYING IN HIS OWN BEHALF may be impeached by compelling him to answer on cross-examination that he has previously been arrested for other crimes. *Jackson v. State*, 30.
13. IMPEACHMENT OF ACQUITTED CODEFENDANT.—If the credibility and standing of a person who has been a codefendant with a party charged with crime is attacked while he is testifying in behalf of the accused, by evidence that he has been charged with such crime, he has the right to prove his acquittal of such charge, and it is prejudicial to the accused to deny such right. *Jackson v. State*, 30.
14. IMPEACHMENT BY CONTRADICTORY STATEMENTS.—If part of the written evidence of a witness is introduced for the purpose of impeaching him, the whole of such evidence is admissible, if necessary to explain or throw light on that point used to discredit him. *Jackson v. State*, 30.
15. IMPEACHMENT BY REPORT OF EVIDENCE AT PRELIMINARY EXAMINATION. The testimony of a witness taken at a preliminary examination, and totally at variance with his evidence as given at the final trial, is admissible for the purpose of impeaching him, although he denies the correctness of the record of the testimony first taken, denounces it as
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false, and states that he never read it, and that if he had read it he would not have signed it. *Jackson v. State*, 30.

16. **IMPEACHMENT—REBUTTAL OF.**—If the credibility of a witness is attacked by evidence that he has been charged with crime, he has a right to prove his acquittal of that charge. *Jackson v. State*, 30.

See **ESCAMY**, 9, 10; **CARRIERS**, 3; **INDICTMENT**, 1; **WILLS**, 2.

WORDS AND PHRASES.

See **DEFINITIONS**.

